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RECOMMENDED FOR FULL-TEXT PUBLICATION
Pursuant to Sixth Circuit Rule 206
ELECTRONIC CITATION:
1999 FED App. 0014P (6th Cir.)
File Name: 99a0014p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, et al.,
Plaintiffs-Appellees,

v.

DANIEL ROBINSON, et al. (Class I),
Defendants-Appellants,

SHARON BALDOCK, et al. (Class II),
Defendants-Appellees.

No. 97-5958

Appeal from the United States District Court
for the Eastern District of Tennessee at Knoxville.
No. 92-00587—James H. Jarvis, II, Chief District Judge.
Argued: September 22, 1998
Decided and Filed: January 14, 1999
Before: KENNEDY and COLE, Circuit Judges;
RUSSELL,District Judge.*

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*The Honorable Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

COUNSEL

ARGUED: E. H. Rayson, KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, Knoxville, Tennessee, for Appellants. James D. Holzhauer, MAYER, BROWN & PLATT, Chicago, Illinois, Jonathan D. Reed, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, for Appellees. **ON BRIEF:** E. H. Rayson, William P. Snyder, John C. Burgin, Jr., KRAMER, RAYSON, LEAKE, RODGERS & MORGAN, Knoxville, Tennessee, for Appellants. James D. Holzhauer, MAYER, BROWN & PLATT, Chicago, Illinois, Jonathan D. Reed, Joe Mont McAfee, Michael T. McClamroch, EGERTON, McAFEE, ARMISTEAD & DAVIS, Knoxville, Tennessee, for Appellees.

OPINION

R. GUY COLE, JR., Circuit Judge. At issue in this appeal is whether the layoffs at Sea Ray Boats, Inc. between 1989 and 1991 constituted a partial termination of the company's stock ownership and profit sharing plan ("Plan"), governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. §§ 1001-1461. Sea Ray's administrative committee ("Committee") concluded that the company had not terminated the Plan. Upon review, the district court granted summary judgment in favor of the Committee and a class of Sea Ray employees ("Class II") who are current or fully vested participants in the Plan and their beneficiaries. Another class of former Sea Ray employees ("Class I"), non-vested former participants in the Plan and their beneficiaries, contends that the district court erred in applying an arbitrary and capricious rather than a de novo standard of review of the Committee's decision. Class I also contends that the Committee erred in determining that a partial termination of the Plan had not

occurred. For the reasons that follow, we affirm the judgment of the district court.

I.

Sea Ray manufactures sport boats, sport cruisers, and yachts — a particular line of boats known as pleasure crafts. Founded in the late 1950s by C.N. Ray in Oxford, Michigan, the company enjoyed steady growth from the late 1960s through the 1970s. During this time, it systematically opened new plants and renovated existing ones. During the 1980s, the company experienced unprecedented growth, enjoying an average annual growth of 35 percent from 1983 to 1986 and record sales from 1986 to 1988. In 1986, Brunswick Corporation purchased Sea Ray, but allowed it to operate as a separate entity.

As part of its employee benefits, Sea Ray offers employees membership in the Plan, a defined contribution stock bonus and profit-sharing plan established under the provisions of ERISA. The Committee, as a fiduciary under ERISA, acts as the administrator for the Plan. Sea Ray funds the Plan in its entirety; participating employees do not contribute to the Plan. The Plan's assets are allocated to the individual accounts of its participants, with the benefits of each participant based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, or forfeitures of accounts of other participants which may be allocated to such participant's account. Although membership in the Plan is voluntary, a majority of Sea Ray's employees participate.

Sea Ray begins contributing to the Plan on behalf of an employee after he or she has completed one full year of service. As permitted under ERISA, 29 U.S.C. § 1053(a)(1)(B), the Plan adopts a gradual vesting formula:

Credited Service	Vested (or Non-Forfeitable) Percentage
fewer than 3 year	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
more than 7 years	100%

Employees become fully vested in their account balances after they have worked at Sea Ray for seven full years. Under normal circumstances, if an employee leaves Sea Ray before completing seven years of service, the non-vested (or forfeitable) portion of his or her account balance is reallocated among the employees who remain at Sea Ray and are currently participating in the Plan.

The one exception to reallocation for non-fully vested employees, stated in § 19 of the Plan and codified in ERISA, 26 U.S.C. § 411(d)(3), occurs if Sea Ray engages in a partial termination of the Plan. In this event, the terminated employees become fully vested and are entitled to retain their full account balances irrespective of the years they have actually served.

During Sea Ray's period of unprecedented growth, membership in the Plan grew from 1,501 employees in July 1985 to 3,832 employees in July 1989. Beginning in March 1989, however, Sea Ray began to experience serious declines in sales, affecting all boats except yachts. During many of the months during 1989 through 1991, Sea Ray laid off part of its work force; some layoffs began as temporary, but almost all became permanent. By June 1990, as the company reduced its number of employees, the number of participants in the Plan declined to 3,060 employees. In 1990, Congress passed a federal luxury tax targeting five high-priced consumer goods — private boats, private planes, cars, jewelry, and furs — as part of its annual budget agreement: effective January 1991, any

boat was subject to a 10 percent tax for the amount above $100,000. In the aftermath of the luxury tax, sales of all boats continued to decline as did the number of participants in the Plan. By June 1991, membership in the Plan had shrunk to 1,968 participants and twelve of the thirteen plants had either reduced their workforce or closed altogether.

Between 1989 and 1991, decisions regarding hiring, firing, and dismissal of employees were not vested in any one centralized figure or manager but left to the discretion of each plant. Since each plant at Sea Ray was operated separately as a profit center, each plant's manager determined the plant's criteria for laying off employees at his or her plant.[1] During the downsizing, however, Sea Ray's corporate headquarters issued written directions to affected plant managers on how to handle the layoffs.

In June 1992, prior to any litigation leading to the present case, the Committee convened to discuss the partial termination question and the governing legal standards, and made the following determinations:

1. The reductions in employees was motivated by unfavorable changes in the economy and not by targeted employment numbers.
2. Partial determinations were defined by the Internal Revenue Code and determined on the basis of all facts and circumstances.
3. The historic application of the partial termination rule focused primarily on whether the termination resulted in funds reverted to the employer or discrimination in favor of highly compensated

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[1]Each laid-off employee completed a "Change of Employee Status" ("COS") form, which provided the work history, and also served as an exit interview with the individual in charge of the plant's personnel. Sea Ray systematically gathered COS forms from the plants, but did not use them in determining the number of participants in the Plan, instead relying on annual company census lists containing the name of all employees.

employees; recently, however, the emphasis had shifted to percentage decline in employment.

4. Case law was unsettled on what constitutes a significant decline and the level of deference, if any, owed to employer or IRS determinations.
5. Lastly, the courts' determinations regarding partial terminations were binding on the IRS only if it joined the suit or the suit was an appeal of a final administrative determination by the IRS.

Later that month, the Committee reconvened and concluded that for the period between 1989 and 1991, "there were no facts or circumstances other than the layoff due to the cyclical business which would dictate a finding of a Partial Termination." In making that determination, the Committee decided to calculate the percentage of layoffs for each year separately. The Committee also decided that the company would retain legal counsel to commence a lawsuit on behalf of the plan to seek a judicial ruling upholding the Committee's determination that a partial termination did not occur. The Committee filed an action before the district court in August. Following pre-trial matters, Class I filed a motion for summary judgment on December 1995. The Committee and Class II each filed a cross-motion for summary judgment in March 1996. The district court referred the motion and cross-motions to a magistrate judge, who recommended that the district court grant the cross-motions by the Committee and Class II and deny the motion by Class I. Specifically, it recommended holding that 1) the Committee's determination that a partial termination had not occurred was subject to the arbitrary and capricious standard of review; 2) the layoffs, calculated as caused by two separate corporate events, were not at a level generally considered determinative of a partial termination; and 3) the Committee's determinations regarding partial termination were neither arbitrary nor capricious. Although Class I filed an objection to the magistrate judge's report and

recommendation, the district court accepted it in its entirety. Class I filed a timely notice of appeal.

II.

We review a district court's order granting summary judgment de novo. *See Roush v. Weastec, Inc.*, 96 F.3d 840, 843 (6th Cir. 1996). Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). This court draws all reasonable inferences in favor of the non-moving party. *See Terry Barr Sales Agency, Inc. v. All-Lock Co.*, 96 F.3d 174, 178 (6th Cir. 1996) (citing Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986)). This court recognizes, however, that "the mere existence of a scintilla of evidence in support of [a party's] position will be insufficient; there must be evidence on which the jury could reasonably find for the [party]." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

III.

We first address whether the Plan vests discretionary authority in the Committee, the administrator of the Plan. If so, we then apply the arbitrary and capricious standard of review to the Committee's decision that a partial determination of the Plan did not occur at Sea Ray between 1989 and 1991. *See Perez v. Aetna Life Ins. Co.*, 150 F.3d 550, 555 (6th Cir. 1998) (en banc) (citing *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111 (1989)).

The Committee contends that the Plan grants it discretion to determine partial determinations, pointing to the language in § 16(c) of the Plan:

> The Committee shall have *all powers necessary* to enable it to administer the Plan and Trust Agreement in accordance with their provisions, including without limitation the following:

. . .

(2) *determining* the appropriate allocations to Participants' Accounts pursuant to Section 6;

(3) *determining* the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;

. . .

(7) *construing and interpreting* the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;

. . .

The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interests of the Participants (and their Beneficiaries). Any *discretion* granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on a nondiscriminatory basis.

(emphasis added).

Class I contends that the Committee lacked discretion in this matter because any such determination turned on a matter of law. Although the Plan allows the Committee to determine whether the Plan had been partially terminated, it does not define "partial termination." Class I contends that, as a matter of law, this determination should be provided not by the Committee, but by the court. Therefore, this court should apply a de novo standard of review, following other circuits which have held that eligibility under ERISA and its regulations are a question of law. *See e.g., Weil v. Retirement Plan Admin. Comm. of Terson Co., Inc.*, 913 F.2d 1045, 1048-49 (2nd Cir.

1990); *Gauer v. Connors*, 953 F.2d 97, 99-100 (4th Cir. 1991); *Pratt v. Petroleum Production Management. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 658 (10th Cir. 1990).

Because the Plan is governed by ERISA, we apply federal common law rules of contract interpretation in making our determination. *See Perez*, 150 F.3d at 556. In doing so, we "take direction" from state law and general contract law principles and interpret the Plan's provisions "according to their plain meaning, in an ordinary and popular sense." *Id.* (internal citations omitted). Plain meaning requires that we "must give effect to the unambiguous terms of an ERISA plan." *Id.* (internal citations omitted).

We find that a plain reading of the Plan reveals that it clearly grants discretion to the Committee. We have earlier held that discretionary authority does not "hinge[] on incantation of the word 'discretion' or any other 'magic word,'" *Johnson v. Eaton Corp.*, 970 F.2d 1569, 1572, n.2 (6th Cir. 1992) (quoting *Block v. Pitney Bowes, Inc.*, 952 F.2d 1450, 1453 (D.C. Cir. 1992)), but whether the ERISA plan grants the administrator "authority to determine eligibility for benefits or to construe the terms of the plan." *Firestone*, 489 U.S. at 115. While terms in § 16 of the Plan such as "construe" and "interpret" by themselves would likely be enough to establish discretion, we need not decide that issue because § 16 also expressly gives the Committee "discretion."

We reject Class I's contention that because the Plan does not define "partial termination," the Committee's discretion does not extend to partial terminations. The Committee's discretion to interpret and construe the Plan logically extends to terms of the Plan, since any interpretation of a plan turns on the meaning of terms contained therein. To limit an administrator's discretion to only those terms explicitly defined would undermine the administrator's discretionary power or require companies to write interminably long plans to account for every term.

We also reject Class I's argument that eligibility determinations are questions of law subject to de novo review. Although other circuits have adopted this view, *see Weil*, 913 F.2d at 1048-49; *Gauer*, 953 F.2d at 99-100; *Pratt*, 920 F.2d at 658, we have declined to do so. The Committee, by virtue of its grant of discretion, may interpret the language of terms in the plan. *See Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 694 (6th Cir. 1989).

Accordingly, we review the Committee's determinations regarding partial terminations under the arbitrary and capricious standard.

IV.

Having established the appropriate standard of review, we now evaluate whether the Committee's determination that a partial termination did not occur between 1989 and 1991 was arbitrary and capricious. The Committee contends that the percentage of terminations at Sea Ray during these years, in the absence of improper motive or bias on the part of Sea Ray, did not constitute a partial termination. Class I counters that the percentage of terminations was higher than the Committee calculated, and the real percentage was high enough in itself to be determinative of a partial termination. The differences in calculations stem from the Committee's decision to calculate the layoffs from each year separately and to exclude certain classes of former employees in its tally of terminated employees.

In determining whether a partial termination has occurred, this court has held that Treasury Regulation § 1.411(d)-2(b)(1)[2]

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[2]Treasury Regulation § 1.411(d)-2(b)(1) states,

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to *all the facts and circumstances in a particular case*. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the

"directs us to consider all the facts and circumstances, of which the percentage of excluded plan participants is but one, albeit generally the most persuasive one." *Kreis v. Charles O. Townley, M.D. and Associates, P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). In some cases, however, we have held that "the percentage may be so high or so low as to be determinative standing alone." *Id.* at 80.

Neither this court nor other circuits have established clear benchmarks for these high or low percentages. This court noted that one court has held 34 and 51 percent terminations of the work force constituted partial terminations, while other courts have held that termination rates of 16.7 percent, 13.0 percent, and 12.4 percent were insufficient to trigger a partial termination. *See id.* at 83 (citing *See Tipton and Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 162 (1984) (34 and 51 percent); *Wishner v. St. Luke's Hosp.*, 550 F.Supp. 1016, 1019 (S.D.N.Y. 1982) (16.7 percent); *Taylor v. Food Giant, Inc. Salaried Employees Pension Plan*, No. C 84-253A, 1984 WL 8144, at *3 (N.D.Ga. Nov. 30, 1984) (13.0 percent); *Babb v. Olney Paint Co.*, 764 F.2d 240, 243 (4th Cir. 1985) (12.4 percent)). The United States Tax Court in *Halliburton Co. v. C.I.R.*, 100 T.C. 216 (1993) stated that a percentage exceeding 50 percent may be sufficient standing alone to establish a partial termination; conversely, a drop of less than 20 percent is significant only if accompanied by egregious abuse on the part of the employer. *See id.* at 236-37. A drop of at least than 20 percent is sufficient, if coupled with other circumstances, to suggest a partial termination. *See id.* at 237. We decline to establish rigid percentage parameters for partial terminations, and repeat our holding in *Kreis* that while the percentage of excluded plan participants is the most persuasive factor, we must generally consider all the facts and circumstances, "unless

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rights of employees to vest in benefits under the plan. (emphasis added).

and until Congress or the Treasury Department provides otherwise." *Kreis*, 833 F.2d at 80.

Before evaluating the Committee's determination, we must first ascertain the percentage of participants involuntarily excluded from the Plan between 1989 and 1991 through actual or constructive discharge. Whether an actual or constructive discharge has occurred is a question of fact, *see id.* at 81, and we must affirm the district court's findings on this question unless they are clearly erroneous. *See* Fed. R. Civ. P. 52(a). A finding of fact is clearly erroneous only when, although there may be some evidence to support the finding, "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer*, 470 U.S. 564, 573 (1985) (citation omitted).

The district court first concluded that the layoffs at Sea Ray between 1989 and 1991 were caused by two separate events: a two-year downturn in the small boat industry and a downturn in the large boat business caused by the federal luxury tax. It therefore decided to analyze the percentage of actual or constructive discharges as separate years. In deciding which terminated employees to count for the partial termination calculation, the court excluded classes of employees who left Sea Ray for the following reasons: death, normal retirements, terminations for cause, terminations due to disabilities, departure due to a transfer, and voluntary departures — even if the departure were influenced by the economic downturn at the company. Class I disagrees with the district court's findings, maintaining that the discharges should be considered as one event and that former employees who left in anticipation of an involuntary layoff should count as constructive discharges.

We see no occasion to disturb the factual findings of the district court. First, our review of the record does not firmly convince us that the district court erred in its conclusion that two events occurred. We agree that the economic downturn in 1989 and the federal luxury tax in 1990, while both leading to dire consequences at Sea Ray, stem from two independent

factors. Second, while we do not dispute that some former Sea Ray employees felt compelled to leave in light of the economic downturn, a showing of constructive discharge requires more than dissatisfaction with the economic conditions at work. *See e.g., Kreis*, 833 F.2d at 82-83; *see also Halliburton*, 100 T.C. at 241 (stating same proposition). The record does not reflect that working conditions at Sea Ray were "so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982) (internal citations omitted). To characterize the conditions at Sea Ray as intolerable is to impute liability to the company simply because of broad economic conditions which were beyond the company's control. That imputation exceeds the scope of partial termination.

While adopting the findings of the Committee with the modifications noted by Class II, the district court generated three sets of calculations for the percentage of discharged

employees at Sea Ray between 1989 and 1991, based on each party's interpretation of the layoffs.[3]

Committee	**Class II**	Class I
1989-90:	**1989-90:**	(a) 1989-91:
16.1%	**15.9%**	32.9%
1990-91:	**1990-91:**	(b) 1989-91:
28.8%	**27.9%**	36.7%

Finding no clear error by the district court, we also adopt the percentages generated by Class II. Because we do not find the percentage for either 1989-90 or 1990-91 to be so high as "as to be determinative standing alone," *Kreis*, 833 F.2d at 80, we consider additional facts and circumstances.

This court in *Kreis* considered two additional factors to determine whether a partial termination has occurred: one, the effects on the plan of the exclusion of employees from participation; two, the employer's motives. *See id.* at 79. We similarly apply these factors in the present case. We quickly

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[3]The calculations for the Committee and Class II were generated by the following equation:

$$\%\text{ of involuntary terminations} = \frac{(\text{total reduction of employees}) - (\text{excludable employees})}{\text{total number of participants}}$$

Class II's calculations contain more up-to-date figures on the total reduction of employees for each year.

Class I, which argued that the layoffs between 1989 and 1991 should be analyzed together, used the following equations to generate slightly different percentages:

$$\text{(a) \% of involuntary terminations} = \frac{(\text{terminees in Class I}) + (\text{fully vested participants})}{\text{participants (6/30/89)} + (\text{additional participants over period})}$$

$$\text{(b) \% of involuntary terminations} = \frac{(\text{total reduction}) - (\text{excludable employees})}{\text{total number of participants}}$$

dismiss the first factor, as none of the parties allege that the layoffs at Sea Ray between 1989 and 1991 financially impaired the Plan. For the second factor, we look to see whether the Committee initiated the layoffs to generate profit from the forfeitures from non-vested employees, either for itself or a third party. Evidence of this type of profit "supports but is not sufficient for a finding of bad faith." *Id.* at 80. Nonetheless, we can similarly dismiss this factor, as Class I does not contend that Sea Ray was motivated by improper motives in terminating the employees.

We are left to decide whether the Committee's determination that a partial termination did not occur at Sea Ray between 1989 and 1991 was arbitrary and capricious. The arbitrary and capricious standard is the least demanding form of judicial review and is met when it is possible to "offer a reasoned explanation, based on the evidence, for a particular outcome." *Davis* 887 F.2d. at 693 (quoting *Pokratz v. Jones Dairy Farm*, 771 F.2d 206, 209 (7th Cir.1985)).

We find that the Committee's determination regarding the partial termination issue was neither arbitrary nor capricious. The Committee made its decision only after carefully deliberating both the governing legal standards of partial terminations and Sea Ray's actions in light of these standards. Given its calculation of the percentage of terminations — both years were below 30 percent — and the absence of any damage to the Plan or improper motive for profit, the Committee was reasonable in concluding that the Plan had not been partially terminated.

V.

For the reasons stated above, we **affirm** the district court's grant of summary judgment in favor of the Committee and Class II.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED
Jul 7 1 05 PM '97
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY____ DEP. CLERK

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,

Plaintiffs,

v.

DANIEL ROBINSON, ET AL. (CLASS 1)

Defendants,

No. 3:92-cv-587

MEMORANDUM AND ORDER

This is a declaratory judgment action brought by the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Committee), and William J. Barrington, Diane M. Yaconetti, and William R. McManaman, in their capacities as members of that Committee. The Committee seeks a declaratory judgment enforcing the provisions of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Plan), and to determine the rights and liabilities of the parties under the Plan, pursuant to the Employee Retirement Income Security Act (ERISA) and the Internal Revenue Code (IRC or Code). The Committee named as defendants two putative classes. Class I defendants are all of those "former Sea Ray employees (and their

beneficiaries)" who are participants in the Plan, whose service as Sea Ray employees ended between July 1, 1989, and June 30, 1991, and who had an interest in the Plan that was not fully vested when their employment ended. [*See* Doc. No. 60]. Class II defendants are all of the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. [*Id.*]. The Committee seeks a declaration that there has not been a partial termination of the Plan; that members of Class I are therefore not entitled to the accelerated full vesting of their account balances that would flow from a partial termination; and that pursuant to the terms of the Plan, the non-vested portions of the Class I members' account balances should therefore be reallocated to the remaining Plan participants, the members of Class II.

In an exceptionally well-reasoned and well supported report and recommendation (R&R) [Doc. No. 102], the Honorable Thomas W. Phillips, United States Magistrate Judge, recommended that Class I defendants' motion for summary judgment be denied, and that the cross-motions for summary judgment filed by the Committee and the Class II defendants be granted. The Class I defendants filed timely objections [Doc. No. 106] to the magistrate judge's R&R.

The court has very carefully conducted a *de novo* review of the record, the R&R, and the Class I defendants' timely filed objections thereto, and concurs in the magistrate judge's recommendation. Specifically, the court agrees that the percentage of Plan participants terminated was insufficient for a find of a partial termination, such that the Class I defendants' account balances should be reallocated to the remaining Plan participants, the members of Class II.

In analyzing the very difficult issues extant in this case, the magistrate judge first had to wrestle with the familiar, yet difficult, question of the appropriate standard of review to apply to the decision of the Plan's administrator. As noted by the Class II defendants in their response to the Class I defendants' objections to the R&R, contemporaneously with the magistrate judge's deliberations in this case, the Sixth Circuit Court of Appeals decided *Perez v. Aetna Life Ins. Co.*, 96 F.3d 813 (6th Cir. 1996), which supports the magistrate judge's conclusions in the R&R. Suffice it to say that the magistrate judge was clearly correct in his conclusion that the Sea Ray Plan expressly grants the Committee the discretionary power to determine participants' eligibility for benefits or to interpret the terms of the Plan. Therefore, the magistrate judge correctly applied the arbitrary and capricious, rather than the *de novo*, standard of review to the Committee's decision that no partial termination of the Plan had occurred.

The remaining objections of the Class I defendants center on the percentage decline in Plan participants over the relevant Plan years. The Class I defendants complain generally that the Committee failed to take into account that Ray Industries, Inc. (Sea Ray Company), a wholly-owned subsidiary of Brunswick Corporation, as apparently contrary to the rest of the boating industry, did not experience major variations in its business cycle until 1989. At that time, the Class I defendants contend, Sea Ray Company began to experience losses and concomitant declines in employment that must be considered as one major corporate event.

However, it is clear that the Committee discussed at length the nature of the down-sizing that was occurring and had occurred in the Sea Ray Company's employment and the corresponding declines in Plan participation. Indeed, it was entirely reasonable for the magistrate judge to conclude that there were two major corporate events precipitating the decline

in Plan participation. First, a downturn in the pleasure craft industry occurred well before a subsequent downturn in the production of yachts, which undisputedly occurred as a result of the so-called luxury tax that was imposed upon large and costly boats. Thus, treating the years separately, and the major corporate events as having distinct causes, was entirely reasonable. As the magistrate judge recognized, there simply was no correlate with the two events.

Furthermore, when viewed in this fashion, the major corporate events and the different years over which they occurred fail to yield a termination of 50% or more of the Sea Ray Company's employees in any given year.

In short, the Class I defendants fail to raise in their objections any issues that were not fully and adequately addressed by the magistrate judge in the R&R. Because the reasons why judgment should be entered for the Committee and the Class II defendants have been fully and accurately articulated by the magistrate judge, the issuance by this court of a detailed opinion would be duplicative and serve no useful purpose. Accordingly, the R&R is ACCEPTED IN WHOLE pursuant to 28 U.S.C. § 636(b)(1), whereby the Class I defendants' motion for summary judgment [Doc. No. 74] is DENIED; the Committee's and the Class II defendants' motions for summary judgment [Doc. Nos. 82 and 84] are GRANTED; all remaining motions are DENIED AS MOOT; and this case is DISMISSED WITH PREJUDICE. The Clerk is DIRECTED to close this case.

ENTER:

_____

James H. Jarvis
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED
Oct 30 9 11 AM '96
U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY ____ DEP. CLERK

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,	)	
Plaintiffs,	)	
v.	)	No. 3:92-cv-587 (Jarvis/Phillips)
DANIEL ROBINSON, ET AL. (CLASS 1)	)	
Defendants,	)	

REPORT AND RECOMMENDATION

This matter is before the undersigned pursuant to 28 U.S.C. § 636(b), the Rules of this Court, and by order of reference from the Honorable James H. Jarvis, United States District Judge [Doc. 74].

The Class I defendants in this action have moved the court for entry of summary judgment in their favor [Doc. 74]. Plaintiffs have filed a cross-motion for summary judgment [Doc. 82], as have the Class II defendants [Doc. 84]. The Class I defendants have replied [Doc. 91]. Plaintiffs and Class II defendants have replied in support of their cross-motions for summary judgment and in opposition to the Class I motion for summary judgment [Docs. 93, 96, 97]. The Class I defendants have filed a supplemental brief [Doc. 95].

BACKGROUND

On August 25, 1992, plaintiffs, the Administrative Committee of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Committee), and William J. Barrington, Dianne M. Yaconetti, and William R. McManaman, in their capacities as members of that Committee, filed this action seeking a declaratory judgment to enforce the provisions of the Sea Ray Employees' Stock Ownership and Profit Sharing Plan (Plan), and to determine the rights and liabilities of the parties under the Plan, under the Employee Retirement Income Security Act (ERISA), and under the Internal Revenue Code (IRC).[1] Plaintiffs named as defendants two putative classes. Class I defendants are all those former Sea Ray employees (and their beneficiaries) who were participants in the Plan, whose service as Sea Ray employees ended between July 1, 1989 and June 30, 1991, and who had an interest in the Plan that was not fully vested when their employment ended. Memorandum and Order of April 13, 1993. Class II defendants are all the present and former Plan participants (and their beneficiaries) who may be entitled under the terms of the Plan to receive a portion of the account balances forfeited by Class I members if there has been no partial termination. *Id.* Plaintiffs seek a declaration that there has not been a partial termination of the Plan, that members of Class I are therefore not entitled to the accelerated full vesting of their account balances that would flow from a partial termination, and that pursuant to the terms of the Plan, the nonvested portions of the Class I members' account

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[1]To be considered a qualified trust under the tax code, a pension plan must provide that, upon its termination or partial termination, the rights of all affected employees to benefits accrued become nonforfeitable. 29 U.S.C. § 411(d)(3).

balances should therefore be reallocated to the remaining Plan participants, the members of Class II.[2]

The central legal issue in this case is whether, as a result of reductions in employment levels at Sea Ray from 1989 to 1991, there has been a partial termination of the Sea Ray Plan. It appears that the determination of partial termination shall be made solely on the finding as to whether the percentage of participants terminated was so large as to cause a partial termination of the Plan.

The Plan, a defined contribution stock bonus and profit-sharing plan, was established under the provisions of ERISA, and, for purposes of determining whether there has been partial termination, is controlled by the provisions of the Plan itself and by regulations promulgated under the IRC. Plan § 1; 29 U.S.C. § 1002(34). Plaintiffs are the administrators of the Plan; the Committee is a fiduciary under ERISA and is authorized by the Plan to exercise "all powers necessary to enable it to administer the Plan," including "determining the appropriate allocations to Participants' Accounts" and "construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code; . . ." Plan § 16(c). All of the contributions to the Plan are made by Sea Ray, who deducts the contributions as salary expense for tax purposes. IRC § 404. The Plan's assets are allocated to the individual accounts of the participants and the benefits of each participant are "based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account." *Id.*

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[2]Class II defendants have a similarity of interest with plaintiffs.

While Sea Ray begins making contributions to the Plan on behalf of employees after one year of service,[3] those employees do not become fully vested in their account balances (*i.e.*, they do not fully "own" their account balances) until they have been with the company for seven years. Vesting occurs gradually:

Credited Service	Vested (or Nonforfeitable) %
Less than 3 years	0%
3 years	20%
4 years	40%
5 years	60%
6 years	80%
7 years	100%

Plan § 10. ERISA expressly permits gradual vesting using this formula. 29 U.S.C. § 1053(a)(1)(B).

Under normal circumstances, if an employee leaves Sea Ray prior to completing seven years of service, the nonvested (or forfeitable) portion of his or her account balance is reallocated among the remaining Plan participants. Plan §§ 6, 10. However, under the terms of § 19 of the Plan, if there has been a partial termination of the Plan, the account balances of the participants affected by the partial termination would become fully vested (nonforfeitable), and the terminated employees would be entitled to retain their full account balances without regard to years of service. In this case, if there has not been a partial termination, then the nonvested

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[3]A "year of service" means a 12-month period beginning on an employee's employment date or anniversaries of the employment date in which an employee is credited with at least 1000 hours of service [Coll. Ex. 15].

portion of the account balances of the Class I participants are forfeited and must be reallocated among the remaining (Class II) participants in the Plan.[4]

At its June 12, 1992 meeting, the Committee discussed the partial termination question and the governing legal standards. Minutes of June 12, 1992 Committee Meeting. In particular, the following points were noted:

- Whether a partial termination occurs within the meaning of the Internal Revenue Code is determined on the basis of all the facts and circumstances.

- The historic application of the rule focused primarily on whether a failure to vest terminated participants would result in a reversion to the employer or discrimination in favor of highly compensated employees.

- In more recent years, there has been a greater emphasis by both the IRS and the courts on the percentage decline and a lesser emphasis on whether the decline resulted in a reversion or discrimination.

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[4]When Congress enacted ERISA, it codified existing regulations which, interpreting the plan termination provisions of the prior statute, required vesting of benefits if a plan was partially terminated. Those provisions were incorporated into the tax code which provides that, for a plan to qualify for tax benefits, it must provide that "upon its termination or partial termination, the rights of all affected employees to benefits accrued to the date of such termination . . . are nonforfeitable." 26 U.S.C. § 411(d)(3).

- The fact that a decline in participation is attributable to causes beyond the control of the employer may not by itself avoid the possibility of a partial termination.

- Case law is not settled as to the appropriate methodology to be employed in determining whether a decline in participation is significant and whether a significant decline alone will result in a partial termination.

- Some courts have held that the issue of whether a partial termination has occurred is a matter of law to be determined by the court and that neither an employer determination nor an IRS determination is entitled to deference.

- A court's determination as to whether a partial termination has occurred is likely to have a significant impact on an IRS determination, but would not be binding on the IRS unless the IRS had voluntarily joined the suit or the suit was an appeal of a final administration by the IRS.

Id. The Committee determined at the June 26, 1992 meeting that in light of all of the facts and circumstances, there had not been a partial termination of the Plan. Minutes of June 26, 1992 Committee Meeting.

HISTORY

Sea Ray was founded in the late 1950s by C.N. Ray in Oxford, Michigan. Over the years, the company expanded into a full line of pleasure craft, generally grouped into three

categories: sport boats, sports cruisers, and yachts [William J. Barrington Dep. at 72].[5]

Sea Ray began to expand in the late 1960s, building a facility in Phoenix, Arizona, to build sport boats and sport cruisers; soon the corporate headquarters was moved there [Barr. Dep. at 67, 71-72]. In the early 1970s, Sea Ray built a plant at Merritt Island, Florida, to produce larger sport cruisers and eventually sport yachts [Barr. Dep. at 72]. In 1978, Sea Ray designed a plant in Knoxville, Tennessee, to build small boats known as runabouts. This plant later began producing sport cruisers. Soon after, the company built a plant on Tellico Lake near Knoxville, designed to build small sport boats [Barr. Dep. at 71-72]. In the Spring of 1985, the corporate headquarters was moved from Phoenix to Knoxville [Barr. Dep. at 67]. In this time period, a plant was built at Palm Coast, Florida, to build large sport yachts. Soon thereafter, the Cherokee Cove plant, designed to build fast, upscale sport craft known as performance boats, was built on Tellico Lake across a cove from the Tellico plant [Barr. Dep. at 73].

In late 1986, Sea Ray was purchased by the Brunswick Corporation, but continued to operate as a separate unit, making its own business decisions. Sea Ray became a division of the Marine Group within Brunswick, which included the Mercury Marine, Mercury Power Boat, and U.S. Marine divisions [Barr. Dep. at 85]. Also in 1986, to serve the European market, Sea Ray purchased and renovated a plant in Cork, Ireland [Barr. Dep. at 73-74].

In 1988, Sea Ray purchased and renovated a plant at Fort Mill, South Carolina, to produce small sport boats. At about

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[5]At the time of the deposition, Mr. Barrington was the President and Chief Executive Officer of Sea Ray.

the same time, another plant was built in Knoxville, the Riverview plant, to build small sport yachts [Barr. Dep. at 73-74]. The year 1988 also saw the last plant to be built by Sea Ray, a facility at Sykes Creek, Florida, near the Merritt Island plant. This plant produced large yachts [Barr. Dep. at 74].

As exhibited by this history of Sea Ray, growth in the boating industry overall was unprecedented during the 1980s. Growth surged an average of 35 percent per year from 1983 through 1986, and sales remained at historically high levels from 1986 through 1988. From 1985 to 1988, the number of boats sold by Sea Ray increased substantially. Sea Ray added $100 million in volume to its business every year. As it did, it increased its production capacity, as described above, by building or acquiring plants [Barr. Dep. at 84].

As of July 1, 1985 (a year in which Sea Ray sold 12,456 boats), there were 1,501 Plan participants employed at seven Sea Ray locations [Complt. ¶ 50].

Division	Participants
Oxford	377
Phoenix	259
Merritt Island	303
Knoxville	294
Tellico	114
Palm Coast	21
Ray Indust. Knoxville Hdqtrs.	133
TOTAL:	1,501

By July 1, 1989, Sea Ray had expanded to thirteen locations and the number of Plan participants had increased to 3,832 [Complt. ¶ 51].

Division	Participants
Oxford	506
Phoenix	239
Merritt Island	433
Knoxville	474
Tellico	426
Palm Coast	438
Cherokee cove	327
Product Devel. & Eng. Merritt Island	145
Fort Mill	76
Trans. Div. Knoxville	79
Riverview	217
Sykes Creek	58
Ray Indust.	58
TOTAL:	3,832

Sea Ray management monitored trends in the marine industry, as experience had shown that such trends reflected what Sea Ray could expect as a company. Further, Sea Ray management knew that cycles in the marine industry are closely related to national economic cycles; declines in the marine industry are a lot further down and highs are a lot further up.[6] Sea Ray paid particular attention to retail activity at the dealer level; the company built boats in response to dealer orders, which were contingent and could be cancelled at any time [Barr. Dep. at 77-78].

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[6]Mr. Barrington indicated in his deposition that the cycles generally come in ranges of five to ten years, moving up for a period of three to five years and moving down for a period of three to five years. He stated a belief that this trend has been in existence since the 1970s to today [Barr. Dep. at 32].

For the model year 1989, which began July 1, 1988, retail sales ran 22 percent ahead of the previous year through February 1989. However, in March and April 1989, retail sales came in 33 percent below the previous year. Sea Ray had not seen in many years a decline in sales like it saw in March and April 1989 [Barr. Dep. at 135-136]. The decline in sales was across all product lines except the yachts, which continued to sell relatively well until 1990, when the federal luxury tax that targeted high ticket consumer goods went into effect [Barr. Dep. at 39, 86]. By June 30, 1990 (a year in which Sea Ray sold 14,343 boats), the number of Plan participants was 3,060 [Complt. ¶ 52].

Division	Participants
Oxford	315
Phoenix	193
Merritt Island	430
Knoxville	494
Tellico	569
Palm Coast	411
PD&E	168
Trans. Div.	65
Sykes Creek	88
Ray Indust.	327
TOTAL:	3,060

For the fiscal year ending June 30, 1991, there were 1,968 Plan participants [Complt. ¶ 53].

Division	Participants
Phoenix	171
Merritt Island	323
Knoxville	360
Tellico	348
Palm Coast	215
PD&E	128
Trans. Div.	49
Sykes Creek	116
Ray Indust.	259
TOTAL:	1,968

Total sales for Sea Ray during this entire time frame are as follows:

YEAR	UNITS SOLD
1985	12,456
1986	15,916
1987	22,355
1988	24,538
1989	23,214
1990	14,343
1991	10,542

See Complt. ¶ 49.

LAYOFFS
MAY 1989

Sea Ray's initial reaction to the sales downturn came in the form of a temporary layoff in May 1989 [Barr. Dep. at 136]. On May 22, 1989, official notice was issued from corporate headquarters that 10 percent of the 1,900 Sea Ray employees in East Tennessee would be temporarily laid off [Coll. Ex. 2 or

Press Releases]. The Sea Ray press release cited a decline in retail sales as the reason for the layoffs [*See* Ex. 24].

LAYOFFS 90 DAYS PRIOR TO JULY 27, 1989

Plant	Total Employment on 5/32/89	Layoffs through 4/13/89	Total Employment on 7/12/89	% Laid off Period
Oxford	567	93	470	16.4%
Phoenix	313	55	255	17.5%
Merritt Island	564	00	564	0.0%
Knoxville	514	47	458	9.1%
Tellico	547	40	495	7.3%
Palm Coast	54	00	541	0.0%
Cherokee Cove	401	25	360	6.2%
Fort Mill	144	00	144	0.0%
Riverview	298	65	228	21.8%
Sykes Creek	139	00	139	0.0%
	4,028	325	3,654	8.0%

Class I Chart [Doc. 75]; Figures taken from Sea Ray's Head Count Analysis, Coll. Ex. 7.

JULY 1989

On July 17, 1989, Sea Ray's corporate headquarters issued written directions to affected plant managers on how to handle additional layoffs (employees to be laid off were to be notified on July 20th and laid off on July 27th) [Coll. Ex. 3-A, Internal Management Documents]. On July 19, 1989, Brunswick issued a press release noting that 20 percent, or 4,000 employees of its Marine Group workforce would be laid off, with Sea Ray identified as part of that group [Coll. Ex. 2, Press Releases]; Brunswick indicated that the layoffs resulted from a significant reduction in orders from dealers [Ex. 24]. The next day, Sea Ray issued a notice from its headquarters announcing the temporary layoffs [Coll. Exs. 2, 4]. Sea Ray attributed the layoffs to the reduction in retail sales and an unprecedented field inventory build-up [Ex. 24].

On July 21, 1989, notices were also issued to the employees laid off in May, advising them that their layoffs would continue [Ex. 24]. On July 24, 1989, Sea Ray announced the closing of the Fort Mill, South Carolina plant. The press release noted that approximately 140 employees would be affected by the Fort Mill closing, in addition to the approximately 960 employees to be laid off at other locations on July 27th [Coll. Exs. 2, 4]. The field inventory build-up was cited as the reason for the action [Ex. 24].

LAYOFFS ON JULY 27, 1989

Plant	Total Employment on 7/27/89	Layoffs 7/27/89	% Laid off 7/27/89	% Laid off Between 4/21 - 7/27/89
Oxford	470	138	29.4%	40.7%
Phoenix	255	12	4.7%	17.6%
Merritt Island	564	211	37.4%	37.4%
Knoxville	458	103	22.5%	29.2%
Tellico	495	90	18.2%	23.8%
Palm Coast	541	9	16.6%	16.6%
Cherokee Cove	360	182	50.6%	51.6%
Fort Mill	144	144	100.0%	100.0%
Riverview	228	114	50.0%	60.1%
Sykes Creek	139	-0-	0.0%	0.0%
	3,654	1,084	29.7%	35.0%

Class I Chart [Doc. 75]; Figures taken from Sea Ray's Head Count Analysis, Coll. Ex. 7.

AUGUST 1989

On August 14, 1989, Sea Ray issued a press release announcing that the Riverview plant would be consolidated with the Knoxville plant, and that the Cherokee Cove plant would be consolidated with the Tellico plant [Coll. Ex. 2]. No layoffs were expected to result. The actions taken at Riverview

and Cherokee Cove were described on September 27, 1989, as temporary closings.

On August 22, 1989, Sea Ray issued a notice to employees to the effect that the company's position was that failure to return to work after recall would be treated as a voluntary termination [Coll. Ex. 3-A].

An August 25, 1989, internal memorandum demonstrates Sea Ray's acknowledgement of the potential effect of the mid-1989 layoffs on the Pension Plan:

> I spoke with Anna Jeans of Ron Ludwig's office regarding the effect, if any, the recent layoffs would have on the vesting schedule under our ESOP/Profit Sharing Plan. Anna indicated that the magic number adopted by most courts in determining whether or not a partial termination of the plan had occurred would be a permanent termination of 20% or more of the plan participants. I told her that although our layoffs probably exceeded the 20% initially, we anticipated that the majority of the laid-off employees would be brought back (even within six months), so that ultimately the actual number of terminated employees would be expected to be far less than the 20% threshold. The penalty for a partial termination would be to give the terminated employees immediate vesting in their plan accounts.
>
> It was agreed that we would look at the situation later in the year to review the extent to which we had rehired laid-off employees, so as to determine whether

> or not the 20% threshold level had been violated. Unless our business takes a dramatic downturn in the next several months it seems highly unlikely that we will run afoul of the partial termination rules.

[Coll. Ex. 3-A].

NOVEMBER 1989

On November 16, 1989, official notice was sent to employees laid off before July 27, 1989, that they were being converted from temporary layoff to permanent layoff [Coll. Ex. 3-A].

FEBRUARY 1990

On February 20, 1990, corporate headquarters sent a notice to plant managers directing them to notify the employees temporarily laid off on July 27, 1989, and who had not returned to work through recall or rehire, that they were permanently laid off [Coll. Ex. 3-A].

JULY 1990

On July 6, 1990, notices of permanent, not temporary, layoffs were sent to employees and to state and local officials. At the Knoxville and Tellico plants, 139 employees were to be laid off; at the Palm Coast plant, 74 employees were to be laid off; and at the Phoenix plant, 20 employees were to be laid off. Figures on the number of layoffs at the Merritt Island and Oxford plants were not given [Coll. Ex. 8, July '90 - June '91 Layoff Notices, and Coll. Ex. 4].

AUGUST 1990

On August 6, 1990, it was announced that the corporate office workforce in Knoxville would be reduced by 10-15 percent [Coll. Ex. 3-A].

SEPTEMBER 1990

On September 28, 1990, a Sea Ray press release stated that roughly 14 percent of the corporation's employees would be laid off because of continued slow sales [Coll. Ex. 2]. On the same day, permanent layoff notices were issued to employees at the Merritt Island (35), Palm Coast (95), Tellico (97), Oxford (68), Phoenix (8), and Knoxville (77) plants. The remainder (54) were from corporate headquarters in Knoxville [Coll. Ex. 8]. Sea Ray characterized most of the layoffs as permanent, since the company continued to see a slide in the market. The permanent layoffs were kept on a list for rehire; however, there was very little opportunity for rehiring anyone [Barr. Dep. at 104-106].

NOVEMBER 1990

On November 9, 1990, it was announced that effective January 9, 1991, the Oxford plant would be closed, affecting 200 employees [Coll. Ex. 4].

DECEMBER 1990

On December 7, 1990, notice of layoff was given to Palm Coast employees. On March 1, 1991, Merritt Island employees were notified of layoffs, effective March 8, 1991 [Coll. Ex. 8].

MAY 1991

On May 24, 1991, a corporate press release announced that a number of Merritt Island employees were to be laid off due to continuing declining sales and the effects of the luxury tax [Coll. Ex. 2]. Subsequently, on May 28, 1991, Sea Ray notified Florida officials that 106 Merritt Island employees would be laid off due to low retail sales and the luxury tax [Coll. Ex. 4].

AUGUST 1992

In August 1992, notices of permanent layoff were announced at the Knoxville and Tellico plants, affecting 159 employees.

DECEMBER 1992

Notice of another layoff was sent to Tennessee officials on December 14, 1992 [Coll. Ex. 4], affecting 13 employees at the Transportation Division.

ADDITIONAL BACKGROUND ON SEA RAY
THE CORPORATE PERSONNEL RECORD SYSTEM

Within Sea Ray during the relevant time period, there was no one figure or manager in charge of personnel matters. It was not until early 1993 that the position of Director of Human Relations, holding central responsibility for all corporate personnel matters, was created [Barr. Dep. at 107].

Thus, each Sea Ray plant was operated separately as a profit center and the plant's manager was given the responsibility for developing his own personnel policies. Since each facility had its own written personnel policies, no uniformity existed from plant to plant within the corporation [Barr. Dep. at 102-03]. Each plant had its own criteria for determining who got laid off, with some going strictly by employee capability and evaluations, and others considering seniority by departments or seniority by plant [Barr. Dep. at 112-13]. Personnel records for hourly employees were maintained only at the plant level, not at the corporate level, and the process of transmitting an employee's termination report to headquarters was informal [Barr. Dep. at 111, 115].

COS FORM

Each facility did use a form known as a "Change of Employee Status" (COS) form, the basic document containing

an employee's work history [LuAnn Jarnigan Dep. at 13-15].[7] At the time of termination, every terminated employee was to have had an exit interview conducted by the individual in charge of personnel matters at the facility and to have signed the COS form [Jarn. Dep. at 31]. Information on the form was filtered up through the system later and included in other forms and reports not signed or seen by the employee [Jarn. Dep. at 55]. The COS form, however, was not considered an Employee Stock Ownership Plan (ESOP) reporting document; the census is the base ESOP document [Jarn. Dep. at 55]. The census lists, compiled each year on June 30, contain the names of all Sea Ray employees. Figures from the census forms are transposed to an IRS 5500 Form submitted for reporting purposes [Jarn. Dep. at 55].

On June 30, 1989, there were 4,425 total corporate employees. On June 30, 1990, there were 3,309 total corporate employees. On June 30, 1991, there were 2,028 total corporate employees [*See* Coll. Exs. 12-14].

ALL SEA RAY EMPLOYEES

Plant/Division	6/30/89	6/30/90	6/30/91
Fort Mill	127	Closed	Closed
Cherokee Cove	339	Closed	Closed
Riverview	275	Closed	Closed
Oxford	510	317	Closed
Knoxville	504	498	369
Tellico	502	576	349
Merritt Island	528	472	331
Palm Coast	521	540	216

[7]At the time of the deposition, Ms. Jarnigan was the Director of Human Relations at Sea Ray.

Phoenix	275	244	190
Sykes Creek	125	98	133
PD&E	218	168	130
Trans. Div.	87	69	49
Ray Indust.	414	327	261
TOTAL:	4,425	3,309	2,028

[Doc. 75, Class I Chart (developed from Census lists)]. As noted earlier, as of June 30, 1989, there were 3,832 Plan participants. On June 30, 1990, there were 3,060 Plan participants. On June 30, 1991, there were 1,968 Plan participants [Complt. ¶¶ 51-53; Exs. 12-14].

ALL PLAN PARTICIPANTS

Plant/Division	6/30/89	6/30/90	6/30/91
Fort Mill	76	Closed	Closed
Cherokee Cove	327	Closed	Closed
Riverview	217	Closed	Closed
Oxford	506	315	Closed
Knoxville	474	494	360
Tellico	426	569	348
Merritt Island	433	430	323
Palm Coast	438	411	215
Phoenix	239	193	170
Sykes Creek	58	88	116
PD&E	145	168	128
Trans. Div.	79	65	49
Ray Indust.	414	327	259
TOTAL:	3,832	3,060	1,968

[Doc. 75, Class I Chart (developed from Census lists)]. The total number of Plan participants for the 1989-1990 Plan year

is 4,084 (the number at the beginning of the year, 3,832, plus the number added during the year, 252). The total number of participants for the 1990-1991 Plan year is 3,111 (the number at the beginning of the year, 3,060, plus the number added during the year, 51).[8] For the entire two-year period, the total number of participants is 4,139 (the number at the beginning of the period, 3,832, plus the number added during the period, 303) [*See* Docs. 85, 91].

STANDARD OF REVIEW

Class I argues that it is appropriate and necessary for the court to review *de novo* the Plan Committee's decision that in light of all the facts and circumstances, there had not been a partial termination of the Plan.

It is the plaintiffs' position that the Supreme Court has mandated that substantial deference be given to a plan administrator's exercise of discretionary decision-making power. *Firestone Tire and Rubber Co. v. Bruch*, 489 U.S. 101, 111-112, 115, 109 S. Ct. 948 (1989). An administrator's decision to deny a claim for plan benefits based upon interpretation of the plan will be upset only if it is arbitrary and capricious, provided "the plan gives the administrator . . . discretionary authority to determine eligibility for benefits or to construe the terms of the plan." *Id.* at 115; *see also, Whisman v. Robbins*, 55 F.3d 1140, 1143-1144 (6th Cir. 1995); *Sutter v. BASF Corp.*, 964 F.2d 556, 561 (6th Cir. 1992). According to plaintiffs, under *Firestone*, the Committee's determination that a partial termination did not occur should be accorded deference and upset only if arbitrary and capricious.

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[8]Class I has provided a chart and lists of the individuals added to the Plan during the relevant time frame [Doc. 85, Ex. 3].

Class I argues that the Committee's decision turned on a question of law. While section 19 of the Sea Ray Plan permits a determination by the Committee that the Plan has been partially terminated, Class I notes that the Plan contains no definition of "partial termination." In determining whether the Plan was partially terminated, Class I states that reference must be made to controlling statutes, implementing regulations, and interpretative decisions of the courts and administrative officials. Thus, Class I contends that when an eligibility determination by plan administrators turns on a question of law, the courts have not hesitated to apply a *de novo* standard of review. *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1049 (2nd Cir. 1990) (Weil II), vacated in part on other grounds upon rehearing, 933 F.2d 106 (2nd Cir. 1991) (Weil III); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 890 (10th Cir. 1988); *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 148-49 (3rd Cir. 1987), *aff'd* in part and *rev'd* in part on other grounds, 489 U.S. 101, 109 S. Ct. 948 (1989). According to Class I, therefore, because a *de novo* standard of review is appropriate, the determination by the Plan Committee that a partial termination had not occurred is not subject to deference.

In reply to Class I's argument, the Committee contends that the Sixth Circuit, in several cases decided since *Firestone*, has made it clear that even when eligibility determinations turn on questions of law, the arbitrary and capricious standard applies if the plan documents give the administrators the discretion to construe and interpret the plan. *See Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689 (6th Cir. 1989), *cert. denied*, 495 U.S. 905, 110 S. Ct. 1924 (1990); *Moos v. Square D Co.*, 72 F.3d 39, 41 (6th Cir. 1995); *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1247-1248 (6th Cir. 1991); *Callahan v. Rouge Steel Co.*, 941 F.2d 456, 458-495 (6th Cir. 1991). According to plaintiffs, the Sea Ray Plan grants the Committee broad discretion to

exercise "all powers necessary to enable it to administer the Plan." Plan § 16(c). These specifically include powers to "determin[e] the appropriate allocations to Participants' Accounts" and to "constru[e] and interpre[t] the Plan and the Trust Agreement." *Id.*; Complt. ¶¶ 3,5. The Committee states that such language satisfies *Firestone* and requires the use of the abuse of discretion standard. *See, e.g., Sutter*, 964 F.2d at 559, 562 (administrator's exercise of "powers to construe the Plan and . . . determine all questions that may arise thereunder relating to [eligibility and] the amount of benefits to which any Participant . . . may become entitled "is reviewed "under an arbitrary and capricious standard); *Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 658 (10th Cir. 1990) (Plan provision empowering administrator to "construe and interpret" plan "carries with it not only the authority, but also the discretion, to decide questions of plan interpretation"). The Committee notes that its decisions in this matter involved the "constru[ction] and interpret[ation] [of] the Plan" and an exercise of its explicit power to "determin[e] the appropriate allocations to Participants' Accounts" [Plan §§ 19, 16(j)].

The Sixth Circuit has recognized that "discretion is the exception, not the rule and that the arbitrary and capricious standard does not apply unless there is a clear grant of discretion to determine benefits or interpret the plan." *Wulf v. Quantum Chemical Corp.*, 26 F.3d 1368, 1373 (6th Cir. 1994) (emphasis in original) (*citing Anderson v. Great West Life Assurance Co.*, 942 F.2d 392, 395 (6th Cir. 1991)); *see Johnson v. Eaton Corp.*, 970 F.2d 1569, 1571 (6th Cir. 1992) ("This circuit has interpreted *Firestone* to require that the plan 'expressly' give discretionary authority to the administrator"). The court in *Wulf* also recognized that discretion is not an all or nothing thing. *Id.* Rather, a plan can give administrators discretion with respect to some decisions, but not others. The

administrator then, has only the amount and type of discretion granted by the plan and no more. *Id.*

If the administrator or fiduciary has not been given discretionary authority, then any actions are to be reviewed under a *de novo* standard. When applying the *de novo* standard, the court is to interpret the terms of the plan "without deferring to either party's interpretation." *Lake v. Metropolitan Life Ins. Co.*, 73 F.3d 1372, 1377 (6th Cir. 1996) (citations omitted). Under the *de novo* standard, the court "simply decides whether or not it agrees with the decision under review." *Perry v. Simplicity Eng'g*, 900 F.2d 963, 966 (6th Cir. 1990). The court is to do so on the basis of the record before the administrator. *Id.* Further, under the *de novo* standard, the court's goal is to determine which interpretation of the plan is more likely to carry out the intentions of the parties. *Aubrey v. Aetna Life Ins. Co.*, 886 F.2d 119, 122 (6th Cir. 1989), *cert. denied*, 495 U.S. 905 (1990).

If the administrator or fiduciary has been given discretionary authority to determine eligibility for benefits or to construe the terms of the plan, then the deferential standard of arbitrary and capricious applies. The arbitrary and capricious standard is the "least demanding form of judicial review of administrative action." *Davis v. Kentucky Finance Cos. Retirement Plan*, 887 F.2d 689, 693 (6th Cir. 1989).

Two issues arise when applying the arbitrary and capricious standard. The first concerns the bounds of the administrator's authority. The deferential standard of review only applies when the administrator or fiduciary acts within the bounds of discretion given. *Auto Club Ins. Ass'n v. Health and Welfare Plans, Inc.*, 961 F.2d 588, 593 (6th Cir. 1992). That is, the deferential standard of review does not apply if the administrator or fiduciary has exceeded the bounds of authority granted by the plan.

The second issue that arises when applying the arbitrary and capricious standard is reasonableness. The *Davis* court noted that "[w]hen it is possible to offer a reasoned explanation, based on the evidence, for a particular outcome, that outcome is not arbitrary or capricious." *Davis*, 887 F.2d at 693 (citation omitted). The Sixth Circuit has further stated that if the trustee has power to construe disputed terms, the interpretation, if reasonable, will not be disturbed. *Wells v. United States Steel & Carnegie Pension Fund, Inc.*, 950 F.2d 1244, 1248 (6th Cir. 1991). The *Wells* court also indicated that if the administrator's interpretation and the rejected applicant's interpretation are both reasonable, the administrator's interpretation must be allowed to control. *Id.* According to another court, determining "whether the plan administrator's decision was arbitrary and capricious means determining whether it was rational and in good faith, not right." *Dials v. SMC Coal & Terminal Co.*, 891 F. Supp. 373, 376 (E.D. Ky. 1995) (*citing Guy v. Southeastern Iron Workers' Welfare Fund*, 877 F.2d 37, 39 (11th Cir. 1989).

An issue that may affect which standard of review is applicable is whether the administrator's decision is based on a question of law. The Second Circuit has ruled that the *de novo* standard applies unless the plan grants discretionary authority to determine the eligibility of benefits or to construe the terms of the plan. However, when the eligibility determination turns on a question of law, courts should apply the *de novo* standard. *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1048-49 (2nd Cir. 1990) (Weil II). In that case, the court ruled that the determination of whether a partial termination had occurred was a question of law, and therefore the fiduciary's decision was not subject to deference. *Id.* This approach has been followed by the Fourth Circuit, *Gauer v. Connors*, 953 F.2d 97, 99-100 (4th Cir. 1991), and the Tenth Circuit, *Pratt v. Petroleum Production Mgt. Inc. Employee Sav. Plan and Trust*, 920 F.2d 651, 657 (10th Cir. 1990).

The Sixth Circuit appears to have implicitly rejected this approach. One of the issues presented for review in the *Davis* case was whether the district court erred in applying the arbitrary and capricious standard because the question of whether the decedent was an "employee" at the time of his death was a question of law. 887 F.2d at 693. The Sixth Circuit upheld the district court's application of the arbitrary and capricious standard because the plan at issue had explicitly granted the Retirement Committee the discretion and authority to interpret its terms. *Id.* at 693-94. Therefore, under *Firestone*, the district court's application of the arbitrary and capricious standard was correct. The court neither stated nor implied that limitations in addition to those imposed by *Firestone* should be placed on the determination of the standard of review.

The Sea Ray Plan expressly grants the Committee the discretionary power to determine the eligibility for benefits or to interpret the terms of the Plan. Section 16(c) of the Sea Ray Plan contains an enumeration of the Committee's powers and duties. That section begins, "The Committee shall have all powers necessary to enable it to administer the Plan and the Trust Agreement in accordance with their provisions . . . ." In subsection (2), the Committee is authorized to "determin[e] the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid." Then in subsection (7), the Committee is granted the power of "construing and interpreting the Plan and Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code."

By its own terms, the Sea Ray Plan grants the Committee the discretionary power to determine the amount and allocations of benefits under the Plan and to interpret the terms of the Plan. Further, the Plan grants the Committee the power

to adopt rules for administering the Plan consistent with its interpretation of the Plan. Since the Committee's power to adopt rules is incident to its power to interpret the Plan, the Plan grants the Committee more than mere administrative power. Further, since the Plan's grant of authority contains provisions for both the determination of benefits and the interpretation of its terms, this case is distinguishable from *Anderson v. Great West Life Assurance Co.*, where the Sixth Circuit held that the plan's authorization to determine the amount of benefits was not an express granting of authority to interpret the terms of the plan. 942 F.2d at 394-95.

Although the Sea Ray Plan clearly grants the Committee the authority to interpret the term "partial termination" within the Plan, thus triggering the arbitrary and capricious standard of review, Class I defendants argue that this court should nevertheless apply the *de novo* standard, basing their argument on the fact that determining the occurrence of a partial termination is a question of law, which is subject to *de novo* review in other jurisdictions. In *Davis*, the Sixth Circuit held that the district court correctly applied the arbitrary and capricious standard to the committee's interpretation of the term "employee," even though that was a question of law. *Id.*, 887 F.2d at 693. Since this case presents an analogous issue, this court will follow *Davis*, and apply the arbitrary and capricious standard of review to the Committee's decision.

ARBITRARY AND CAPRICIOUS STANDARD

In applying the arbitrary and capricious standard to this case, as noted, two determinations must be made. The first is whether the Committee acted within the bounds of its authority. In this case, there is no dispute that the Committee acted within the bounds of its discretionary authority. The Committee is authorized to interpret the terms of the Plan and the minutes from the Committee's meeting demonstrate that its decision

was based on the definition of a partial termination as the members understood the term.

The second determination to be made in applying the arbitrary and capricious standard to this case is whether the Committee's interpretation of the Plan was reasonable. Although a reasonableness inquiry is not usually very exacting, the complex nature of this case necessitates a more in-depth analysis of the Committee's decision than that normally required.

THE PARTIAL TERMINATION RULE

The first, pre-ERISA Treasury regulation on the subject of partial termination provided that a "facts and circumstances" test would be applied. Treas. Reg. § 1.401-6(b)(2)(1963). Post-ERISA regulations similarly provide that whether a partial termination has occurred is to be determined on the basis of all the facts and circumstances, including such facts as the exclusion by plan amendment or severance by the employer of a group of employees previously covered by the plan. Treas. Reg. § 1.411(d)-2(b). The Treasury Regulation states as follows:

> Whether or not a partial termination of a qualified plan occurs (and the time of such event) shall be determined by the Commissioner with regard to all the facts and circumstances in a particular case. Such facts and circumstances include: the exclusion, by reason of a plan amendment or severance by the employer, of a group of employees who have previously been covered by the plan; and plan amendments which adversely affect the rights of employees to vest in benefits under the plan.

Treas. Reg. § 1.411(d)-2(b)(1). However, the "facts and circumstances" test enunciated in Treas. Reg. § 1.411(d)-2(b)(1) provides "precious little guidance concerning precisely

what facts and circumstances matter and how much." *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987). Reference must be made to case law and to the instructions and interpretations of administrative officials.

IRS technical advice memoranda (TAM) issued in the 1960s and 1970s reflected the anti-abuse policy of the partial termination rule. There was a concern that, in the event of a plan termination, forfeitures would be discriminatorily allocated primarily to officers, shareholders and highly compensated employees, or would revert to the employer, and that in either case, the plan would cease to be operated for the exclusive benefit of employees. *See* PS No. 22, 3 Standard Fed. Tax Serv. (CCH) ¶ 6552 (1944); Rev. Rul. 55-186, 1955-1 C.B. 39. The first technical advice memorandum applying the rule after its codification at § 401(a)(7), TAM 6512108240A (Dec. 10, 1965), noted that "[a]s reflected in the Committee Reports . . . the purpose of this provision is to prevent the development of abuses under forfeitable plans," and held that "no partial termination can be said to have occurred unless it can be demonstrated that reallocation of forfeitures among the remaining participants in the plan . . . results in discrimination . . . or in an abuse which section 401(a)(7) is intended to preclude." *Id.* In a 1974 technical advice memorandum, the IRS found no partial termination despite a 50 percent decline in participation in 1969 and further reductions of 49.9 percent in 1970 and 28 percent in 1971. TAM 7411187610A (Sep. 24, 1974).

In Rev. Ruling 55-186, 1955-1 C.B. 39, it was noted that a discriminatory allocation of forfeitures was a concern in the context of a defined contribution plan because amounts previously contributed to such a plan would inure primarily to the benefit of a prohibited group who would be the last to have their employment terminated and who would stand to benefit from the forfeitures arising from the severance of employment

by other participants. Reversions to the employer were a further concern because contributions could be made and deducted in high-profit, high-tax years and later reverted in low-profit, low-tax years, thereby permitting plans to be operated as tax avoidance mechanisms and not for the exclusive benefit of employees. PS No. 22, *supra*.

Prior to the early 1980s, there were only three published revenue rulings directly on point, each of which held that, under its particular fact pattern, a partial termination had occurred. However, those rulings related to situations where there were reductions in participation of 57.6 percent and 70.6 percent and the potential for significant discrimination or significant reversions.

Class I defendants argue for the use of the definition of partial termination used in *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), *aff'd*, 914 F.2d 83 (5th Cir. 1990):

> A partial termination occurs when, in connection with a major corporate event, a significant percentage of employees covered by the plan are involuntarily excluded or terminated from participating in the plan.

Thus, Class I asserts that the "key consideration" in determining whether a partial termination has occurred is the size of the total contraction of the Plan, regardless of the reasons why particular participants may have left the Plan. In calculating that total contraction, Class I regards as "employer-initiated terminations" all employees who left for reasons other than death, disability retirement or normal retirement, including employees who left voluntarily.[9] They base this "total

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[9]According to Class I, if it is then determined that a partial Plan termination has occurred, the beneficiaries of that determination are identified by a separate examination of the circumstances surrounding the

contraction" theory on the Second Circuit's decision in *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (2nd Cir. 1991) (*Weil III*). The *Weil III* court elaborated as follows:

> Having concluded that the congressional purpose behind the partial termination statute is unclear and that the statute is silent regarding the measurement of a partial termination, we next consider whether the IRS' position is based on a permissible construction of § 411(d)(3). In our view, the IRS' interpretation of § 411(d)(3)--that a partial termination occurs when there is a significant contraction of the plan, and therefore, all terminated plan participants must be considered in a partial termination inquiry--is a reasonable construction in light of the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizeable reduction in benefits under the plan"). Those examples suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole. Moreover, the language used in the treasury regulations, which refers to the exclusion of employees who have been covered by a plan, additionally supports the fact that no distinction was made between vested and non-vested plan participants in these sources. We therefore apply the ratio utilized by the IRS and, as the district court found, conclude that the Plan was partially terminated in 1981 when 33.4% of the Plan participants were discharged.

Weil v. Retirement Plan Admin. Comm., 933 F.2d 106, 110 (2nd Cir. 1991) (*Weil III*).

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termination of each Plan participant or category of Plan participants [Doc. 75].

Class I argues that the partial termination rule is intended to protect the employees' legitimate expectations of benefits. *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1182-1183 (3rd Cir. 1992); *Amato v. Western Union Intl. Inc.*, 773 F.2d 1402, 1409 (2nd Cir. 1985); *United Steelworkers of America v. Harris & Sons Steel Co.*, 706 F.2d 1289, 1298 (3rd Cir. 1983). Reliance is placed on *Halliburton Co. v. Commissioner*, 100 T.C. 216 (1993):

> [T]he partial termination rule does not serve exclusively as a sanction for employer abuse, but also serves to protect employees "who would otherwise be left out in the cold after a drastic and sudden change in the plan." *Chait v. Bernstein*, 835 F.2d 1017, 1021 (3rd Cir. 1987). To say that the reason for awarding plan assets to participants in simply to punish employer abuse ignores one of the fundamental purposes of the rules governing qualified plans, the protection of employee retirement benefits. *See* S. Rept. 93-383, at 1 (1973), 1974-3 C.B. (Supp.) 80..

100 T.C. at 227-228.

The Committee argues that the history of the partial termination rule shows that in judging whether a partial termination has occurred, particular weight must be given to the employer's motive in terminating plan participants. According to the Committee, the Sixth Circuit has ruled that a "necessary [inquiry] in determining whether there has been a partial termination focuses on whether the decision maker," here Sea Ray, "excluded the plan participants in a predatory effort to profit" from the Plan. *Kreis v. Charles O. Townley, M.D. & Assoc. P.C.*, 833 F.2d 74, 80 (6th Cir. 1987). In *Kreis*, the Sixth Circuit held "the existence of such bad faith" to be an important element of the facts and circumstances test for a partial termination, "because such consideration will further

ERISA's goal of curbing the abuse of private retirement pension plans." *Id.*[10] The Committee contends that other courts of appeals have similarly concluded that the goal of the partial termination rule is to prevent employer abuse of benefit plans, and that where a "valid business justification[] was the motivation behind the [company's] actions" in terminating plan participants, rather than "impermissible favoritism towards principal beneficiaries of the . . . plan[]" or a desire to capture a reversion of plan assets, no partial termination occurred. *Babb v. Olney Paint Co.*, 764 F.2d 240, 244 (4th Cir. 1985). *See also, Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d at 890-891 (approving the ruling in *Babb* that an "independent reason[] why there was not a partial termination" was that termination of plan participants was "justified from a business standpoint and was not made in order to favor the principal beneficiaries of the plan"); *Freemen v. Central States, Southeast & Southwest Areas Pension Fund*, 32 F.3d 90, 92 (4th Cir. 1994) ("The purpose of the [partial termination rule] was to ensure that the deductions [for employer contributions to the plan] were genuine--absent vesting of benefits at termination, surplus money on the plan could revert to the employer, and the employer could thereby achieve a long deferral of income").

The Committee notes that the IRS has issued a Plan Termination Handbook which examines three factors that taken together might result in a finding of partial termination: sharp reduction in levels of plan participation; increase in the possibility of discrimination in favor of officers, shareholders or highly-compensated employees; and the creation or increase

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[10]The Committee contends that the Sixth Circuit's decision in *Kreis* is binding on this court. In *Kreis*, the Sixth Circuit held that the partial termination determination is based on "the percentage of plan participants who are involuntarily excluded from the plan by the participants' employer in connection with a major corporate event." 833 F.2d at 79.

of the possibility that plan assets may revert to the employer. § 252(1)-(8). The Committee admits, however, that the Handbook emphasizes that under the facts and circumstances test, no one factor is determinative and that all of the factors should be considered in each case:

> Please note that the issue of the possibility of reversion, prohibited discrimination, or a reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; however, when each of these issues are considered collectively, they may interrelate in such a way as to reflect a partial termination.

IRS, Plan Termination Handbook § 252(10).

The Committee additionally relies on *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), *aff'd* in part and *rev'd* in part on other grounds, 489 U.S. 101, 109 S. Ct. 948 (1989), in which the Third Circuit held that "a partial termination should be found under § 411(d)(3) only if so many people have been terminated that the plan appears to have been created as a mechanism for deferring the recognition of income, and thereby reducing taxes, rather than as a mechanism for the provision of retirement benefits to employees." 828 F.2d at 151. Plaintiffs argue that the Third Circuit expressly rejected an argument that the partial termination provision was designed to protect employee expectations to benefits rather than to prevent plan abuse. *Id. See also, Gluck v. Unisys Corp.*, 960 F.2d 1168, 1183-1185 (3rd Cir. 1992); *Rush v. Meridian Bancorp. Inc.*, No. 93-5308 (E.D. Pa. Jan. 19, 1994) (1994 WL 18233) (plaintiffs claiming partial termination occurred "must demonstrate that [the employer] was attempting to gain tax benefits").

The Committee states that the legislative history of ERISA reflects no congressional intent to broaden the focus of the

partial termination rule to protect employee expectancies even where there is no abuse of a plan's tax-qualified status. *See* S. Rep. No. 383, 93rd Cong., 1st Sess. 50 (1973); H.R. Rep. No. 807, 93rd Cong., 2d Sess. (1974), reprinted in 3 Cong. & Adm. News 4670, 4731 (1974); and H.R. Conf. Rep. No. 1280, 93rd Cong. 2d Sess. 277 (1974), reprinted in 3 Cong. & Adm. News 5038, 5058 (1974).

Thus, plaintiffs urge no partial termination can be found in the complete absence of abuse or even potential for abuse. In the alterative, the Committee contends that considering all of the facts and circumstances, no partial termination occurred [Doc. 93].

As for Class I's reliance on *Weil III* on the total contraction issue, the Committee states that the contention is misplaced. Plaintiffs argue that the issue decided by the Second Circuit in *Weil III* was whether or not fully vested terminees should be included in the partial termination calculation. 933 F.2d at 107. The court of appeals did not consider or decide the "total contraction" argument. To the contrary, according to plaintiffs, *Weil III* repeatedly stated that the employees included in the calculation had been "discharged from their jobs." *Id.* at 107; *see also, Weil II*, 913 F.2d 1045, 1047 (2nd Cir. 1990). In its first *Weil* decision, the court of appeals held that the partial termination calculation should not include employees who "left their employment voluntarily or were dismissed for reasons unrelated to [the corporate reorganization]." 750 F.2d 10, 13 (2nd Cir. 1984). Plaintiffs claim that nothing in *Weil III* (or *Weil II*) changed that holding. Accordingly, Class I's total contraction argument lacks merit [Doc. 93].

The Committee notes that the IRS' Plan Termination Handbook advises that "[t]here is no fixed turnover rate which determines whether a partial termination occurred" and specifically provides that only "employer-initiated

terminations" are to be included in the calculation. IRS, Plan Termination Handbook § 252(6) & (7). Therefore, plaintiffs state that Class I's position that even voluntary quits should be counted among the "employer-initiated terminations" is erroneous.

The Committee notes finally that if the "total contraction" argument could be accepted, the rates of normal turnover would have to be considered.

The Committee again admits that the current IRS Manual gives a more prominent role in the partial termination inquiry to the question whether "a significant percentage of employees were . . . excluded from participating in the plan" than prior IRS pronouncements. IRS, Plan Termination Handbook § 252(6). However, the Committee argues that the IRS continues to recognize that a significant reduction in employment levels does not by itself constitute a partial termination; evidence of plan abuse remains essential. *See id.*, § 252(8) ("factors bearing directly on th[e] [plan termination] issue include whether [the] [p]otential for reversion has been created or increased as a result of participant turnover [and] [t]he possibility for prohibited discrimination has increased"); *id.*, § 252-(10) ("the possibility of reversion, prohibited discrimination, or a reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; however, when each of these issues are considered collectively, they may interrelate in such a way as to reflect a partial termination"); Plan Termination Standards 2 ("a reduction of 20% of the number of employees covered would not by itself cause a partial termination, unless there were additional factors such as prohibited discrimination or potential for reversion").

Class II also notes that in the 1980s, the emphasis of the IRS changed to where greater weight was given as to whether

a "significant percentage of employees were . . . excluded from participating in the plan." IRS, Plan Termination Handbook § 252(6). According to Class II, the IRS has stated that there is a point where the severance percentage could be so great as to preclude other considerations. Rev. Rul. 81-27. However, Class II points out that the Plan Termination Handbook still states that there are factors other than a reduction in participant levels which must be considered: (i) whether the potential for reversion has been created or increased as a result of participant turnover; and (ii) whether the possibility for prohibited discrimination has increased. *Id.* §§ 252(8) & (10).

According to Class II, the case law reveals that when the percentage of plan participants falls within certain parameters, the percentage of employees involuntarily terminated can be solely determinative of whether or not a partial termination has occurred. *See Kreis*, 833 F.2d at 83. In such cases, the existence or nonexistence of employer abuse serves to slide the percentage scale rather than prevent or assure a finding of partial termination. *Id.*, 833 F.2d at 80, 81; *Halliburton Co. v. Commissioner*, 100 T.C. at 232. The Tax Court has acknowledged this sliding scale:

> Between the two extremes, where the percentage drop has not been sufficient in and of itself to establish that a partial termination has occurred, the surrounding facts and circumstances have been considered in conjunction with the percentage drop in order to decide whether the percentage drop is significant.

Halliburton, 100 T.C. at 237, *citing Kreis*, 833 F.2d at 79-80. Class II argues that absent a percentage of terminations of less than 20 percent, which would mandate a finding that no partial termination occurred, and a percentage of terminations greater than 50 percent, which would mandate a finding that partial termination had occurred, the body of law requires that a

balancing take place that determines the presence or lack of an abusive intent on the part of the employer. Where there is not a finding of abusive intent, the threshold percentages of termination must necessarily be high to support a finding of partial termination. Where there is evidence of an abusive intent, the threshold percentages of termination may be lowered to prevent the intended abuse [Doc. 85].

Because there are no allegations of employer abuse, or claims that the Plan has been financially impacted by the terminations, Class II contends that the scale should slide towards the upper end of the percentages to determine whether a partial termination has occurred.

The Committee states that the evidence is clear that Sea Ray's terminations of Plan participants were motivated by valid business considerations and not by any abuse of the Plan. Plaintiffs also argue that Sea Ray did not terminate a substantial percentage of Plan participants within the meaning of the Plan language or ERISA; therefore, when terminations relevant to the partial termination issue are correctly counted, the percentage of terminations is not so large as to require the finding of a partial termination absent abuse.

Class I disagrees with the Committee and Class II that finding abuse is an essential element in finding that the Plan has been partially terminated.

Layoffs caused by economic circumstances can cause a partial termination of a plan. *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 160-161 (1984); *Peter M. Boruta, M.D., P.C. v. Commissioner*, T.C. Memo. 1988-172. The fact that there is no evidence of abuse or bad faith will not *per se* insulate the employer from a finding that a partial termination occurred. *Halliburton*, 100 T.C. at 229. Intent to deprive employees of benefits is not essential to a finding of a partial

termination. *Tipton and Kalmbach*, 83 T.C. at 161. Further, the fact that the economic circumstances that led to the layoffs were not the fault of the employer does not preclude the finding of a partial term- ination. *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982).

In *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), the Sixth Circuit created a two-part test to determine if a partial termination has occurred. The first part determines the effects on the plan of the exclusion of employees from participation in the plan. *Id.* at 79. The second part focuses on the motives of the decision maker. *Id.* These two general inquiries may not be the only factors a court can consider. This is because the Sixth Circuit in *Kreis* limited its discussion of partial terminations to those two factors because of the context of the case. *Id.* at 80. Hence, in a different context, such as the present case, a court may consider additional factors.

EFFECTS ON THE PLAN

A significant factor in determining the effects on the Plan from the exclusion of employees from participation in the Plan is the percentage of Plan participants who were involuntarily excluded from the Plan by Sea Ray in connection with a major corporate event. *Id.* This involves four factors.

MAJOR CORPORATE EVENT

The first factor concerns something termed a major corporate event.[11] No case has defined precisely what constitutes a major corporate event, primarily because it has never been

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[11]A major corporate event is not necessarily a prerequisite to finding that a partial termination has occurred. Layoffs due to nothing more than a downturn in business can trigger a partial termination. *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 160-162 (1984), but most courts have focused on a major corporate event.

raised as an issue. But guidance can be taken from the fact patterns of some of the cases that involve partial terminations. A partial list of obvious major corporate events includes closing down divisions of a corporation, *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989), sale of assets, *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1141 (C.D. Ill. 1992), mergers, and corporate reorganizations, *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991). *See Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (Weil I).

The fundamental principle contained within the "major corporate event" factor is that the event is the identifiable cause of a large reduction in the work force, which thereby affects the plan. It is the drop in participation attributable to the cause which is considered in determining whether a partial termination has occurred. Hence, the substantial reduction in plan participants must be attributable to "involuntary exclusions" or "employee terminations" from the plan arising from the major corporate event. *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 891 (10th Cir. 1988). Further, the requirement of a major corporate event focuses the court's inquiry on those terminations that are relevant for ERISA purposes and excludes those terminations that occur in the regular course of business. Reductions unrelated to the cause are not relevant because, presumably, they would have occurred in any event. *Halliburton*, 100 T.C. at 230-31, *citing Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134 (3rd Cir. 1987), and *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991).

The Tax Court, in two cases, has ruled that the event of layoffs due to economic downturns can be sufficient for finding a partial termination. *See Tipton and Kalmbach, Inc. v. Commissioner*, 83 T.C. 154, 161 (1984); *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982). In *Halliburton*

Co. v. Commissioner, 100 T.C. 216 (1993), the court reiterated the ruling in *Tipton and Kalmbach, Inc.*, that a partial termination can result from layoffs due to an economic downturn. 83 T.C. at 230.

However, the court in *Halliburton* went on to rule that the downsizing caused by the 1986 collapse in the oil market was not the type of major corporate event usually found in partial termination cases. *Id.* at 231. The court noted that the economic downturn did not cause Halliburton to permanently restructure its operations. Rather, Halliburton engaged in a "temporary economizing measure, affecting all its operations, which was aimed at meeting a business emergency." *Id.* The court further noted that the economic cause was a "transitory economic phenomenon" and that Halliburton's response was likewise temporary. *Id.* This finding was supported by the fact that Halliburton was able to rehire many of the employees it laid off in the immediately succeeding years. *Id.* The court then concluded that "the circumstances surrounding the reduction in plan participation are less suggestive of a partial termination than would be the case had a permanent restructuring of the firm occurred, *e.g.*, the closure of a plant or division." *Id.*

The *Halliburton* court noted that one of the most important facts and circumstances bearing on the vertical partial termination issue is the size of the drop in plan participation resulting from the event causing such reduction. *Kreis*, 833 F.2d at 79. Employers who reduce their workforce due to adverse economic conditions must also distinguish their situations from that presented in *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984), by rehiring terminated participants in a relatively rapid manner. In that case, the workforce reduction was permanent, and participation levels did not recover in the years following the reduction. *Id.* at 162. Thus, a permanent downsizing or restructuring in response to

adverse business conditions suggests that a partial termination of a plan has taken place. *Id.*

At issue here is whether the terminations occurred as the result of a single corporate event. *See Halliburton*, 100 T.C. at 230; *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (Weil I). The court finds that at least one major corporate event occurred in this case. The business climate for the boating business and the imposition of the luxury tax provide sufficient proof of events to conclude that at least one requisite event has occurred.

MULTIPLE EVENTS?

Plaintiffs and Class II argue that there has been more than one event in this case. In the two-year period, plaintiffs have identified four periods in which there were major layoffs, one of which was particularly distinct because it was brought on at the large boat facilities in Florida due to the luxury tax that went into effect in 1991. According to the Committee, the layoffs in December 1990 and March-May 1991 at the Palm Coast and Merritt Island, Florida plants were due to the imposition of the luxury tax.

Class II defendants argue that there were two events: a two-year downturn in the small boat industry, and the downturn in the large boat business caused by the luxury tax. Class II notes that the total workforce at the Merritt Island and Palm Coast facilities that produced luxury yachts was reduced by a single employee during the 1989-1990 Plan year. However, following the imposition of the luxury tax, employment at these plants was reduced 44 percent in Plan year 1990-1991. Class II argues that since the 454 terminations resulting from these reductions represented 40 percent of the total Sea Ray terminations (1,143) for 1990-1991, the impact of the luxury tax on the high end product of Sea Ray represents an additional corporate event [Doc. 96].

Class II states that where terminations have occurred over a substantial period of time, the courts have been willing to break the terminations down into separate groups for the purpose of calculating the appropriate percentages. *See Halliburton*, 100 T.C. at 230, *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 12 (2nd Cir. 1984) (*Weil I*), Class II notes that in *Tipton & Kalmbach, Inc.*, 83 T.C. at 155, it was found that a long-term corporate downturn associated with normal industry volatility is not considered to be a single event and may be measured in separate years. *See also Kreis*, 833 F.2d at 83. According to Class II, the IRS has also accepted the concept of segregating multiple year terminations into separate percentage breakdowns for analysis. *See* IRS, Plan Termination Handbook § 252(5)(c) [Doc. 85]. Class II contends that if the position of Class I is taken to its logical conclusion, every employer would have to take a wait and see attitude toward the effects of any reduction of the workforce regardless of time frame. If the whole concept of ERISA plans is to encourage the creation and funding of retirement benefits for all employees, Class II argues that this type of burden is inconsistent with promoting the implementation of such retirement plans [Doc. 96].

Additionally, plaintiffs suggest that the court possibly should either consider the percentage reduction in each Plan year separately, or should adjust the percentage guidelines to take into account the multi-year period [Doc. 93].[12] The Committee contends that considering normal turnover rates in the industry, it would make no sense to apply the percentage guidelines--particularly the 20 percent threshold--to multi-year periods. Plaintiffs argue that in normal economic conditions, many employers will experience 20 percent or more turnover

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[12]Plaintiffs indicate that if their motion for summary judgment is denied, they would request the opportunity to make an appropriate deduction for normal turnover at a later time [Doc. 83].

in two years [Doc. 93].[13] Relying on the IRS guidelines, plaintiffs suggest a turnover rate based on the supposed cyclical nature of the marine industry generally be considered while determining whether the appropriate percentages in this case:

> The facts and circumstances must be considered in each case and may include the extent to which terminated employees are replaced, and the normal turnover rate is a base period. The base period ordinarily should be a set of consecutive plan years (at least two) from which the normal turnover rate can be determined, and should reflect a period of normal business operations rather than one of unusual growth or reduction. Generally, the plan years selected should be those immediately preceding the period in question.

IRS, Plan Termination Handbook § 252(7).

Class I argues that there has been one event. Class I relies on the case of *In re Gulf Pension Litigation*:

> Defendants argue that in determining whether a vertical or partial termination occurred the court should consider only the number of employees excluded within a single plan year. The court does not find this position to be supported by logic or

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[13]Plaintiffs note that excluding layoffs, the median turnover rate for all companies during the four quarters beginning July 1989, for example, was 12.2 percent. Bureau of National Affairs, Quarterly Reports on Job Absence and Turnover, 3rd Quarter 1989-2nd Quarter 1990. *See also,* Vaughn, *Employee Turnover Study*, The Pension Forum (Aug. 1992) (during the two-year period preceding the Sea Ray downturn, average annual turnover among employees with more than one year of service was 13 percent).

> required by authority. Most reported vertical partial termination rulings and decisions did not involve massive corporate restructuring of the scale implemented by *Gulf* and *Chevron*. The facts in those decisions were therefore generally limited to a period of less than a year. There is nothing in the language of the rule itself, however, that requires that a significant corporate event occur within a year, and the ending of a calendar year has no intrinsic relevance in making this evaluation. The IRS guidance found in § 252(7) of the Plan Termination Handbook instructs that "[t]he turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period." Both the IRS, in its Technical Advice Memorandum concerning the Employee's Retirement Plan of A & P Company, and the Second Circuit in *Weil I*, 750 F.2d at 12, have stated that a series of employer-initiated terminations related to the same event may be considered in determining whether a partial termination has occurred even if those terminations occur over a multi-year period. This court likewise concludes that, assuming plaintiffs can prove it, a vertical partial termination rate will be higher than when the work force is contracting. It is therefore not reasonable to assume that the 1978-1981 turnover rate would have continued in the 1984-1986 era.

In re Gulf Pension Litigation, 764 F. Supp. 1149, 1166-67 (S.D. Tex. 1991), *aff'd sub nom., Borst v. Chevron Corp.*, 36 F.3d 1308 (5th Cir. 1994), *cert. denied*, _ U.S. _, 115 S. Ct. 1699, 131 (1995). The corporate event considered by the *In re Gulf Pension Litigation* court spanned two and one-half years.

In regard to possibly adjusting the percentages to account for normal turnover, Class I argues that "Sea Ray had no normal year" and therefore cannot deduct normal turnover. From gradual growth to accelerated growth at the rate of $100 million a year in the eighties, Class I notes that Sea Ray continued to climb and expand until the sudden unprecedented drop in 1989. Before the drop off, Sea Ray's experience was one of continuous and dramatic growth. Class I further notes that the two years preceding the decline, Plan years 1987-88 and 1988-89, were the years of Sea Ray's greatest growth. Class I points out that the IRS has opined that the normal turnover rate should reflect a period of normal operations, rather than one of unusual growth or reduction, and that the period selected for determining the rate should be the two years preceding the decline. According to Class I, plaintiffs cannot possibly arrive at such a calculation.

As noted by Class I, in the complaint, no distinction is made with respect to various layoffs. The downturn is described as continuous. In announcing layoffs, reference was always made to declining market conditions generally. Even the announcements in 1991 either mixed the luxury tax together with conditions in the industry generally, or did not mention the luxury tax at all. Mr. Barrington, Sea Ray's President and CEO, referred to the slide as continuous [Barr. Dep. at 136-139].

The cause of the crisis at Sea Ray was an economic downturn in the boating industry, rapid, severe and reflected by substantial reductions in the workforce and the closing of three manufacturing facilities. The imposition of the luxury tax resulted in an additional drop of sales with significant terminations at the Merritt Island and Palm Coast plants and the closure of the Oxford plant. It appears to the court that two events occurred in this case. The circumstances surrounding the large boat layoffs were distinctly different than those for the

small boats. Mr. Barrington indicated that the decline in sales was across all product lines except the yachts, which continued to sell relatively well until 1990, when the luxury tax went into effect [Barr. Dep. at 39, 86-87]. It does not appear that the additional large wave of layoffs would have occurred but for the luxury tax.

A long-term corporate downturn associated with normal industry volatility is not considered to be a single event and may be measured in separate years. *Tipton & Kalmbach, Inc.*, 83 T.C. at 155; *Kreis*, 833 F.2d at 83. The IRS has accepted the concept of segregating multiple year termination into separate percentage breakdowns for analysis. *See* IRS, Plan Termination Handbook § 252(5)(c). The court is unpersuaded by the arguments of Class I relating to the *In re Gulf Pension Litigation* case, 764 F. Supp. 1149 (S.D. Tex. 1991), as that case is too factually dissimilar to the matter at hand.

The court finds that two separate events occurred. As a result, it is the opinion of the undersigned that the Plan should be analyzed in separate years for the purpose of calculating the appropriate percentages.

INVOLUNTARY TERMINATIONS

Every analysis of the facts and circumstances which might show a partial termination of a plan includes consideration of the number of plan participants whose employment has been terminated. It must be decided which classes of employees will be included in the calculation. The goal of the calculation is to identify those employees who were involuntarily excluded from participating in the plan due to employer-initiated terminations in connection with a major corporate event. *In re Gulf Pension Litigation*, 764 F. Supp. at 1160; *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1302-03. In every case, it is clear that not every employee separated from service should be included in the affected employee class. Certain

employees would have terminated employment regardless of the economic circumstances. Others who left may not have been within the class of plan participants which Congress intended to protect under the partial termination rules.

The parties agree that certain classes of separated employees should not be counted in the partial termination percentage. Such classes include deaths, normal retirements, terminations for cause, and terminations due to disabilities. IRS, Plan Termination Handbook § 252(7). The discontinuance of such employees' participation in a plan is deemed not to be attributable to the employer's reductions in force, and so such employees are deemed not to have been affected by such action. *See In re Gulf Pension Litigation*, 764 F. Supp. at 1168; *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1302-1303.

There is also general agreement that transferred employees are not to be included among those who were involuntarily excluded from participating in a plan. *See Halliburton*, 100 T.C. at 245; *In re Gulf Pension Litigation*, 764 F. Supp. at 1165-66; *Morales*, 718 F. Supp. at 1302-03. Further, since the purpose of the calculation is to determine the percentage of those involuntarily excluded from participating in a plan, employees who voluntarily leave the company are also not to be included in the calculation. *Halliburton*, 100 T.C. at 239-43; *Morales*, 718 F. Supp. at 1302 ("a voluntary decision to leave employment does not trigger a partial termination"); *Anderson v. Emergency Medicine Assoc.*, 860 F.2d 987, 990 (10th Cir. 1988); *Sage v. Automation, Inc. Pension Plan and Trust*, 845 F.2d 885, 891 (10th Cir. 1988); *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74, 79 (6th Cir. 1987); *Weil v. Retirement Plan Admin. Comm.*, 750 F.2d 10, 11-13 (2nd Cir. 1984) (*Weil I*); *In re Gulf Pension Litigation*, 764 F. Supp. 1149, 1166 (S.D. Tex. 1991); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989).

The underlying data for the initial list of Class I employees was collected in 1993 by an assistant to Ms. Jarnigan. The list was an attempt to identify all of the employees who left the Sea Ray Plan during the two Plan years at issue, with the reasons for termination entered by the assistant as voluntary, involuntary, layoff, and other (death). The list was then sent to the plants, where additional information was sought, such as whether the employee had been laid off, rehired, or refused recall. After the additional information, if any, was received from the plants and noted, the list was sent back to headquarters, where the final data base for plaintiffs' version of Class I was prepared [Jarn. Dep. at 35, 39-40, 42]. With one exception, Sea Ray put a terminated employee on the list if the employee's final termination was the result of being laid off: once the announcement had been made that a plant would close, anyone who left employment at that plant after the announcement of the plant closing was considered a layoff [Jarn. Dep. at 42].

Thus, plaintiffs excluded from Class I any Plan participants who voluntarily left employment with Sea Ray with no further explanation on their COS forms and those who left Sea Ray for work with another employer, even if they left for fear of being laid off by Sea Ray [Jarn. Dep. at 84-85]. Plaintiffs further excluded participants who volunteered to take a termination when a reduction in force was announced, to spare the layoff of other employees. Plaintiffs classified those employees as voluntary layoffs [Jarn. Dep. at 65]. Plaintiffs also excluded participants not responding to a recall, considering them "voluntary terminations." Finally, plaintiffs excluded from Class I any terminated participants who were fully vested.

The initial list identified 963 Plan participants believed to qualify for Class I. Approximately 1200 participants who left

during the relevant time period were excluded from the Class I list.

In regard to determining whether the former employees not included in Class I were properly excluded, the Class I defendants contend that the parties agreed that the COS forms from six plants would be reviewed, the reasons for termination categorized, numbers assigned to each category, and then those would be extended by percentage to all plants and divisions [Doc. 91]. The six plants were Fort Mill, Cherokee Cove, Tellico, Knoxville, Riverview, and Oxford. While COS forms could not be found for all Plan terminees, through the process, Class I claimed to have developed numbers for terminees who were laid off, terminees who left voluntarily with the stated reason of accepting or seeking employment elsewhere, and those who left voluntarily with no reason stated on the form.[14]

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[14]Class II notes that during the discovery phase, counsel for Class II objected to the use of these COS forms for any purpose other than sampling to determine if any substantial deviation existed between the ERISA census materials and the COS forms for certain closed plants. A company-wide review of the COS forms was not conducted. Neither plaintiffs nor Class II indicated that they agreed to allow the COS forms to be considered as anything more than research documents for statistical sampling purposes.

Class II contends that if the COS forms cannot be relied upon, then the presumption must be that the census compilations maintained by Sea Ray for ERISA reporting purposes are the accurate source data. The compilations do not contain an in-depth determination of the employee's motivations in voluntarily terminating employment. Class II argues that there is no Internal Revenue Code, Treasury Regulation, or Department of Labor Regulation that requires Sea Ray to maintain such information. Additionally, Class II states that because many employees terminate employment by simply not coming to work, that absent authority requiring a large employer to maintain such in-depth records, it would be unfair for this court to include voluntarily terminated participants in Class I.

FULLY VESTED V. NON-VESTED

There appears to be a split of authority on whether a distinction should be made between vested and non-vested employees for the purpose of calculating the significant percentage of drop in plan participation. The Second Circuit takes the approach that all terminated plan participants must be considered in the partial termination inquiry. *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d at 110 (*Weil III*). This position is based on the belief that Congress "regarded a partial termination to be a sudden and dramatic change in the plan as a whole" and that the language used in the Treasury Regulations refers to the exclusion of employees who were covered by the plan. *Id.* Further, the *Weil III* court concluded that the regulations do not make a distinction between vested and non-vested employees. *Id.* Hence, that court determined that the purpose of the significant percentage test is to gauge the effect of the terminations on the plan as a whole. This position was also adopted by the court in *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297, 1302 (E.D. La. 1989).

The court in *In re Gulf Pension Litigation* takes the opposite position, only including non-vested employees in its calculation. 764 F. Supp. 1149, 1165 (E.D. Tex. 1994). This position is based on the belief that the partial termination rule exists to "prevent forfeiture of pension benefits that have not yet vested and to prevent a windfall to the employer through a reversion of money on which the employer has paid no federal income taxes." *Id.* Hence, the court felt that including fully vested employees does not further these goals of ERISA. *Id.*

The number of Plan participants terminated who were fully vested included 123 during the 1989-1990 Plan year and 273 during the 1990-1991 Plan year, for a total of 396.

The IRS' plan termination provision explains the term "discharge" in the context of "employer-initiated terminations:

> (7) The turnover rate is determined by dividing the employer-initiated terminations by the sum of the total participants at the start of the period and the participants added during the period. Employer-initiated terminations are generally all terminations other than those attributable to death, disability retirements and retirement at normal retirement age. In certain situations, the employer may be able to prove that other terminations were also not employer-initiated. The Service takes the position that, in general, fully vested terminees are included in determining whether there has been a partial termination. This position was upheld in *Weil v. Terson Co. Retirement Plan Committee*, 82 Civ. 8468 (S.D. N.Y., June 15, 1988). Terminations are counted even if caused by an event outside the employer's control, such as terminations due to depressed economic conditions. However, substantial diminution in employee participation was not deemed employer-initiated and thus did not result in a partial termination, where strikers failed to return to work after being offered reemployment. *B.C.M.* 39344 (October 16, 1984).

IRS, Plan Termination Handbook § 252(7). Thus, the IRS takes the view that fully vested terminees should be counted in the percentage of plan participation drop. *Id.*

In *Weil III*, the court noted as follows:

> Having concluded that the congressional purpose behind the partial termination statute is unclear and that the statute is silent regarding the measurement of

> a partial termination, we next consider whether the IRS' position is based on a permissible construction of § 411(d)(3). In our view, the IRS' interpretation of § 411(d)(3)--that a partial termination occurs when there is a significant contraction of the plan, and therefore, all terminated plan participants must be considered in a partial termination inquiry--is a reasonable construction in light of the examples provided in the House and Senate Reports ("a large reduction in the work force, or a sizeable reduction in benefits under the plan"). Those ex- amples suggest that Congress regarded a partial termination to be a sudden and dramatic change in the plan as a whole. Moreover, the language used in the Treasury regulations, which refers to the exclusion of employees who have been covered by a plan, additionally supports the IRS' position.
>
> We also find significance in the fact that no distinction was made between vested and non-vested plan participants in these sources. We therefore apply the ratio utilized by the IRS and, as the district court found, conclude that the plan was partially terminated in 1981 when 33.4 percent of the plan participants were discharged.

Weil v. Retirement Plan Admin. Comm., 933 F.2d 106, 110 (2nd Cir. 1991) (*Weil III*).

The Committee has agreed to include fully vested terminees in the percentage calculation [*See* Doc. 83]. Therefore, for purposes of developing the significant percentage of drop in Plan participation in this case, the fully vested Plan terminees will be counted.

CONSTRUCTIVE DISCHARGE

The decisions recognize that Plan terminees should be counted in the significant percentage if they have been constructively discharged. Class I has raised as an issue in this case whether some employees who resigned their positions during the relevant time period should be considered as constructively discharged and therefore regarded as involuntarily terminated.

In *Kreis v. Charles O. Townley, M.D., & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), the Sixth Circuit ruled that the doctrine of constructive discharge, created in the context of civil rights law, "provides an appropriate basis for ascertaining whether participants were involuntarily excluded from the Plans . . . ." 833 F.2d at 81. The court then went on to review the law of constructive discharge in the Sixth Circuit:

> [T]he constructive discharge issue depends upon the facts of each case and requires an inquiry into the intent of the employer and the reasonably foreseeable impact of the employer's conduct upon the employee . . . . [A] finding of constructive discharge [also] requires the determination that: "working conditions would have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign." *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). *Accord Williams v. Caterpillar Tractor Co.*, 770 F.2d 47, 49 (6th Cir. 1985); *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984). "The employee's perception of his situation is judged objectively. 'An employee may not be unreasonably sensitive to his working environment. A constructive discharge arises only when a reasonable person would find conditions intolerable.'" *Henry v. Lennox Indus.*, 768 F.2d 746, 752 n.3 (6th Cir. 1985) (*quoting Johnson v. Bunny Bread Co.*, 646 F.2d 1250, 1256 (8th Cir. 1981)).

Kreis, 833 F.2d at 82. The Sixth Circuit has elsewhere ruled that the employer is held to intend the foreseeable consequences of his conduct. *Held v. Gulf Oil Co.*, 684 F.2d 427, 432 (6th Cir. 1982). Also, in the civil rights context, the Sixth Circuit ruled that "[p]roof of discrimination alone is not a sufficient predicate for a finding of constructive discharge; there must be other aggravating factors. *Geisler v. Folsom*, 735 F.2d 991, 996 (6th Cir. 1984) (*citing Clark v. Marsh*, 665 F.2d 1168, 1173-74 (D.C. Cir. 1981). Having defined "constructive discharge," the court in *Kreis* then considered whether there had been constructive discharges of the two employees to whom the doctrine could have applied in that case--two staff assistants employed in the doctors' offices. The court noted earlier in its opinion that whether there had been a constructive discharge is a question of fact. 833 F.2d at 81. With respect to a secretary who quit to work elsewhere, the district court had found that she had been constructively discharged because, needing a full-time job, "she justifiably and reasonably feared" she would be working only part-time when three of the five doctors on the staff were fired. 833 F.2d at 82. With respect to a transcriptionist, the district court found she left for other employment because of a similar fear of having her hours cut. *Id.* Although the Sixth Circuit found it significant that the voluntary terminations occurred because of employee concerns for long-term employment, the appellate court concluded that the facts in the record did not support the finding of constructive discharge on either case. Class II argues that the Sixth Circuit apparently placed the burden of proving the constructive discharge on the party asserting such issue. 833 F.2d at 82-83.

In *Halliburton*, almost all the employees counted as voluntarily resigning filled out a form giving their reasons for leaving. None stated he or she was leaving because of an anticipated discharge or layoff, and none were counted in

deciding whether a partial termination had occurred. *Halliburton*, 100 T.C. at 242. The court noted that

> [S]ome employees might leave their jobs of their own accord, even when economic situations are bad, because of dissatisfaction with their situations or for personal reasons. The partial termination rule was not meant to protect such persons--they do not have the same expectation with respect to the vesting of their accrued benefits that involuntarily separated employees do. Moreover, vesting their benefits would not necessarily deter abuse by employers.

Halliburton, 100 T.C. at 241. The *Halliburton* court concluded that employees can be found to be constructively discharged if they resign due to intolerable working conditions created by the employer. *Id.* The court went on to hold that voluntary, non-employer-initiated terminations are not to be considered in deciding whether a partial termination has occurred.

In *Collignon v. Reporting Services Co.*, 796 F. Supp. 1136, 1140-41 (C.D. Ill. 1992), that court ruled that employees are constructively discharged if they resign after it is clear that there is no prospect of continuing to work for the employer, as in the case when a company sells its assets. *See also, Morales v. Pan American Life Ins. Co.*, 718 F. Supp. at 1303 (no prospect of working when division closes down). The court determined that constructive discharge occurs wherever an employee reasonably believes his employment may be at an end. *Collignon*, 796 F. Supp. at 1141-42; *Morales*, 718 F. Supp. at 1303.

Plaintiffs contend that except when it is shown that an employee "resigned due to intolerable working conditions: or left "after it is clear that there is no prospect of continuing to work for the employer" [*Halliburton*, 100 T.C. at 240],

employees who leave voluntarily cannot be counted for partial termination purposes. Class II claims that the employer must have overtly and purposely created a hostile and unbearable work environment or else the employee must have actual notice that his employment is about to be terminated such as an actual closure notice [Doc. 85].

Class I argues that the evidence shows that when the layoffs were announced on or about July 27, 1989, the employees at Cherokee Cove were told or knew beyond a reasonable doubt that the plant was to be closed, and that those who left voluntarily did so in anticipation of layoff. They further note that the conditions at the Tellico plant after the July 1989 layoff were such that employees were well advised or encouraged to look for work elsewhere. Class I also argues that employees at the Phoenix plant left in anticipation of layoff, and even feared the plant would close [Class I filing of June 5, 1996].[15]

There is insufficient evidence to demonstrate that the employees were constructively discharged. Although it is probable that the economic conditions at Sea Ray were a factor in some, if not most, of the cases of employees leaving early, such consideration does not make the choice to leave involuntary. Just because economic conditions are bad enough to require layoffs does not mean that the conditions have risen to the level of "intolerable" or that there was clearly no prospect of continuing to work for the employer. As noted in *Halliburton*, "some employees might leave their jobs of their own accord, even when economic conditions are bad, because

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[15]Class I submitted the affidavits of several workers: Dottye Odle is an example of a former employee who claims to have resigned before being laid off because of a need for job security. Robert C. West states he resigned once being told Cherokee Cove plant would close and upon finding another job.

of dissatisfaction with their situations or for personal reasons. 100 T.C. at 241. Simple concern over future long-term employment is insufficient to sustain a claim of constructive discharge. *Kreis*, 833 F.2d at 82-83.

SIGNIFICANT PERCENTAGE

The third factor, and probably the most important, is that the major corporate event must result in a "significant percentage"[16] of plan participants being involuntarily excluded from participation in the plan. *Kreis*, 833 F.2d at 79. The significant percentage test has generally been accepted by courts ruling on the partial termination issue. *See, e.g., Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d at 151; *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. at 159-160; *In re Gulf Pension Litigation*, 764 F. Supp. at 1163-1164; *Kreis*, 833 F.2d at 79. As one court recognized, "there is no magical figure at which a partial termination occurs." *Weil v. Retirement Plan Admin. Comm.*, 913 F.2d 1045, 1052 (2nd Cir. 1990) (Weil II) (citations omitted). On the other hand, the Sixth Circuit has recognized that the "percentage may be so high or so low as to be determinative standing alone." *Kreis*, 833 F.2d at 80.

As noted previously, generally, a percentage above 50 percent will be determinative of the occurrence of a partial

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[16]The Third Circuit has rejected the "significant percentage test" relying instead on there being a relationship between the number of employees terminated and the appearance of the plan as a mechanism for deferring income, not paying benefits. *Bruch v. Firestone Tire and Rubber Co.*, 828 F.2d 134, 151 (3rd Cir. 1987), *aff'd in part, rev'd in part*, 489 U.S. 101, 109 S. Ct. 948 (1989). *See also Gluck v. Unisys Corp.*, 960 F.2d 1168, 1183 (3rd Cir. 1992).

termination, *Halliburton*, 100 T.C. at 236,[17] whereas figures below 20 percent will only be significant if there is evidence of egregious abuse.[18] *In re Gulf Pension Litigation*, 764 F. Supp. at 1164. Percentages between 20 percent and 50 percent will be significant only if combined with other factors. *Id.*[19]

The Sixth Circuit in *Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987), engaged in a substantial review of the case law then in effect for the purpose of determining what percentages had been considered to be significant to the point of solely sustaining a finding of partial termination. The court noted at that time that the lowest percentage sufficient to find a partial termination was the 34 percent of *Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984).

The cases set forth the formula to be used in calculating the percentage of involuntary terminations. The denominator of the fraction is composed of the total number of Plan participants at the beginning of the relevant period, plus all those participants added to the Plan during that time period.

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[17]*See Tipton v. Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984) (51% in year 1972); *Peter M. Boruta, M.D., P.C. v. Commissioner*, T.C. Memo. 1988-172 (66.67%).

[18]For cases where percentages below 20% have been insufficient for finding partial termination, *see Kreis v. Charles O. Townley, M.D. & Assoc., P.C.*, 833 F.2d 74 (6th Cir. 1987) (13.6% and 15%); *Babb v. Olney Paint Co.*, 764 F.2d 240 (4th Cir. 1985) (12.4%); *Morales v. Pan American Life Ins. Co.*, 718 F. Supp. 1297 (E.D. La. 1989) (15.3%); *Ehm v. Phillips Petroleum Co.*, 583 F. Supp. 1113 (D. Kan. 1984) (2.5%); *Wishner v. St. Luke's Hosp. Ctr.*, 550 F. Supp. 1016 (S.D.N.Y. 1982) (3.7%).

[19]*See Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984) (34%); *In re Gulf Pension Litigation*, 764 F. Supp. 1149 (S.D. Tex. 1991) (45.2%); *Weil v. Retirement Plan Admin. Comm.*, 933 F.2d 106 (1991) (Weil III) (33.4%).

Tipton & Kalmbach, Inc. at 156. The numerator consists of those Plan participants classified as involuntarily terminated during that time period due to the major corporate event minus the excludable employees. IRS, Plan Termination Handbook § 252(7).

The fraction is as follows:

$$\frac{\text{Total Reduction Minus Excludable Employees}}{\text{Total Number of Participants}}$$

In this case, of 4,135 total Plan participants, 2,216 employees were terminated during the 1989-1991 period.[20] Class I states this figure should be adjusted to 2,167 [Doc. 91]. Of this number, 963 were believed by plaintiffs to compose Class I.[21] Of the remaining 1,253 terminated employees, 648 have been identified by plaintiffs as employees who voluntarily terminated their employment with Sea Ray or employees who died, retired, or became disabled [Doc. 91].[22] Plaintiffs claim

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[20]Class II adopts the statistics of plaintiffs in their initial memorandum.

[21]Plaintiffs note that they do not concede that those 963 individuals all belong in Class I. Plaintiffs state that for purposes of class notification, Sea Ray provided Class I counsel with a list of the names and addresses of individuals the company believed to be in Class I, but it never "conceded" or "stipulated" that those individuals are all in Class I or where all involuntarily terminated, any more than Class I counsel has conceded that no other individuals belong in Class I. Plaintiffs indicate that throughout this litigation it has been clear that if the court concludes that a partial termination took place, an individual-by-individual factual review would be conducted by the Plan to determine who is and who is not entitled to vesting.

[22]Class I states that the number of remaining terminees was assumed at first to be 1,253--those other than the 963 dropped from the Plan, plus 352 added to the Plan during the two years. Class I states that the number added was actually 307, making the number of remaining terminees 1,204.

that a total of 648 participants should be excluded from the calculations, including 373 who left the Plan in 1989-90, and 275 who left in 1990-1991 [Doc. 83]. Plaintiffs note that their review shows that 211 participants who were terminated from Plan participation because they died, retired, became disabled, were terminated for cause, or voluntarily terminated their employment for stated reasons unrelated to the corporate event(s) should be excluded, including 102 who left in 1989-90 and 109 who left in 1990-91. It is clear that those employees who died, retired, or became disabled were not involuntarily terminated by the employer, Sea Ray.

Class I argues that 67 terminees on the "excludable" list have been conceded by plaintiffs as being in Class I and should be eliminated from the list. The Committee notes that it does not "concede" that any employees listed all belong in Class I; rather, Sea Ray provided a list of names of individuals "believed" to be in Class I. Class I contends that 85 terminees are fully vested and should be eliminated from the list. Plaintiffs argue that in light of *Weil III*, since fully vested participants who are employer-initiated terminees are to be counted in the partial termination calculation, it is necessary to exclude any fully vested individ- uals if their termination was not employer-initiated (*e.g.*, if they left voluntarily). Class I also states that ten of the medical terminations should be eliminated from the list, because the light duty jobs were eliminated due to layoffs. Plaintiffs argue, however, that the quoted language regarding light duty work appears on only one of the nine COS forms, and there is no indication that the terminees were able to do any light duty jobs that had been "eliminated due to plant layoffs." Further, plaintiffs contend that there is no reason not to apply the rule that employees who leave as a result of disability are not counted for partial termination purposes to the ten Tellico employees [Doc. 97]. Class I further indicates that two employees apparently terminated for long-term disabilities should be on the excluded list.

Further, one employee with a notation about worker's compensation should be on the list. However, Class I goes on to state that all participants marked as having terminated voluntarily should be included in Class I for one of three reasons: (1) there is no explanation, credible or otherwise, how some are connected to the major corporate event and some are not; (b) many left in anticipation of layoff; and (c) numerous "voluntary" entries appear for terminees for whom no COS forms have been made available. Therefore, Class I argues that only 35 terminations due to death (2), termination for cause (30), or medical reasons should be excluded from the employer-initiated terminations used in the calculations for partial termination [Doc. 91].

THE CALCULATIONS

The Committee's calculations are as follows:

1989-90: $\frac{\text{Total Reduction - Excludable Employees}}{\text{Total Number of Participants}} = \frac{(1{,}033 - 373)}{4{,}093} = 16.1\%$

1990-91: " $= \frac{(1{,}183 - 275)}{3{,}151} = 28.8\%$

1989-91: " $= \frac{(2{,}216 - 648)}{4{,}184} = 37.5\%$

This calculation includes all terminees, fully-vested and partially vested. Excluded are those participants who died, retired, became disabled, were terminated for cause, or voluntarily left their employment, except those who left Fort Mill or Oxford after the plant closing announcements.

Class II's calculations adopt the adjustments noted by plaintiffs, but contain more up-to-date figures due to the changes made by Class I:

1989-90: Total Reduction - Excludable Employees / Total Number of Participants = (1,024 - 373) / 4,084 = 15.9%

1990-91: " = (1,143 - 275) / 3,111 = 27.9%

1989-91: " = (2,167 - 648) / 4,139 = 36.7%

On the same assumptions, Class I's calculations for the two-year period are as follows:

1989-91: Terminees in Class I + Fully Vested / Participants (6/30/89) + Additional Participants over Period = (963 + 396) / 4,135 = 32.9%

OR

Total Reduction - Excludable Employees / Total Number of Participants = (2,167 - 648) / 4,135 = 36.7%

The court essentially adopts the calculations of plaintiffs, considering the modifications noted by Class II. It is determined that there is insufficient evidence that Sea Ray failed to include any terminees who left after Sea Ray announced that it was closing the plant at which they worked. Also, as noted previously, Class I's assertions regarding constructive discharge ignore the fact that employees leave their jobs for a variety of reasons every day. Further, the COS forms cannot support a reliable determination of fact: the forms were not implemented company-wide under a standardized format; the manner and methodology employed in completing the COS forms was left to the discretion of the indi-

vidual plant managers; the forms were not transmitted to company headquarters and did not constitute the source documents for ERISA reporting purposes; the forms do not reliably offer information as to an employee's psychological motivation for leaving employment; and the parties did not review all of the forms for every plant.

The undersigned finds it significant that there is no Internal Revenue Code, Treasury Regulation, or Department of Labor Regulation that requires Sea Ray to maintain such records. Without substantive proof that the voluntary terminations were the result of a constructive discharge as conceptualized by the Sixth Circuit, this court must exclude the voluntary terminees from any list constituting the affected members of Class I.

FINANCIAL EFFECTS OF THE PLAN

The Sixth Circuit also considered relevant the extent to which a plan is affected financially by the discharges. *Kreis*, 833 F.2d at 80. The plan can be adversely affected by the terminations in two ways. First, the plan can be impaired financially by a discharge of a significant percentage of participating employees. *Id.* Second, the plan can be financially impaired by discharging those employees who had assured its financial success. *Id.* However, "by itself, the percentage of employees discharged may not always state accurately the discharges' impact on the plan. *Id.*

In this case, none of the parties suggest that the layoffs during the relevant period impaired the Plan financially. Therefore, it is not an issue in this case.

MOTIVES OF EMPLOYER

The second part of the *Kreis* test involves looking at the motives of the employer in discharging the employees. The Sixth Circuit ruled that the inquiry into the employer's motives focuses on whether the employer "excluded the plan

participants in a predatory effort to profit from subsequent forfeitures and/or diminished contribution requirements." The Sixth Circuit there identified two ways in which the employer can abuse the plan. First, the employer can exclude participants in the plan to effect a reversion of the contributions back to the employer. By doing so, the employer would reap a windfall in new income. The Sixth Circuit also noted that for bad faith or abuse to exist, it is not required that the employer be the beneficiary of the windfall. The size of the accrued but non-vested benefits that will fall to the beneficiaries of the employer's decision can be evidence, though not dispositive, of bad faith. Second, by excluding a significant percentage of plan participants, the employer can decrease its contribution duty to the plan.

In this case, the Class I defendants do not argue that Sea Ray was motivated by improper motives in terminating the employees. Since there is no suggestion to the contrary, it is not an issue in this case. No evidence of abuse exists in the instant case that would justify lowering the level at which the percentage drop in Plan participation would be deemed significant.

The court is left with the question "Was the Committee's determination reasonable?" In determining whether or not a partial termination occurred, it appears that the Committee took the following facts into consideration. First, the Committee noted that the layoffs were dictated by business conditions in a cyclical business. Second, the Committee determined that the forfeitures would not decrease the company's required contributions or create or increase the possibility of reversion to the company. Third, the Committee concluded that the terminations were not motivated by a desire to discriminate in favor of highly compensated employees. In short, the Committee found that the only fact supporting the finding of a partial

termination was the layoffs. Defendant Committee member, Mr. Barrington, noted as follows in his deposition:

> A. [W]e took a look at, or at least we were explained to by counsel, what the intent of this whole issue of partial termination was and that we concluded that none of the things that happened to our company or our industry related to any of the explanations or issues that were explained to us. There was no premeditated intent to lay off employees or abusive situation or anything like that. It was simply an economic market-based reduction of our current--our employment at the time.

[Barr. Dep. at 33].

* * * *

> A. I believe that, as explained again by counsel to us, that there was an intent in the law, and the intent being that, to prevent abusive type of situations occurring where employees were terminated on some kind of premeditated basis in order that their unvested benefits would accrue to whomever, and there were some regulations, there were some laws, that were put into place to prevent that sort of thing from happening.
>
> And I believe, in our conclusion, after looking at the facts and in fact, it quite frankly was never an issue in our mind whatsoever, which might be one of the reasons that a lot of these questions I just can't answer because, obviously, it wasn't something that we studied very carefully.

But in any case, I think the analysis of the committee was--the conclusion of the committee was that, in fact, we--there was absolutely no indication whatsoever, no evidence whatsoever, for any type of an abusive situation or a plan or a major event like an acquisition or anything like that that would cause these layoffs, or cause us to be abusive in any manner whatsoever.

* * * *

[T]hey presented us with some of the facts regarding this twenty percent rule and that sort of thing. That was kind of a rule of thumb, Again, a very gray area. And that's about the extent of it, I think.

Q. Okay. Did you look at it from the basis of a two year period--a two plan year period?

A. I think that's the period of time we've been concentrating on, yes.

Q. Okay. All right. So you didn't look at it from the standpoint of one plan year and then another plan year, but rather from the total two year period?

A. The total two year period.

[Barr. Dep. at 52-54.]

* * * *

Q. All right. If you were aware that it was over twenty percent, was that a significant fact to you in making your determination?

A. I don't believe it was, because I still think, as explained to us by counsel, the intent of this whole area is to correct abusive situations. In no

> way was the situation that we were faced with during that period of time anyway influenced by whether or not a person was vested or not vested.

[Barr. Dep. at 55-56.]

Class I contends that the Committee erred in not considering whether constructive discharges occurred. The minutes of the meetings do not reflect that they were. Apparently, Sea Ray officials had discussed internally whether constructive discharges should be considered and decided against it [Jarn. Dep.]. During her deposition, Ms. Jarnigan testified that she discussed with Mr. Cronkhite, Sea Ray's general counsel, the issue of how to classify employees who left voluntarily after the big layoff in July 1989. She noted that it was recognized that those employees might be leaving in anticipation of layoff and might properly be classified as layoffs rather than voluntary terminees, but that the decision was made to classify them as voluntary terminees because an employee's decision to leave before being laid off was considered subjective. The company did not want to speculate on why those employees left [Jarn. Dep. at 86-88].

Class I also argues that the Committee's decision was clearly erroneous because it had failed to consider whether the Plan had been terminated due to the percentage by which the Plan had contracted. Class I states that the issue was not even discussed as the minutes reflect that the discussion focused on lack of abuse [Doc. 91]. Class I further contends that the Committee erred in determining that the Plan had not been partially terminated because of the finding of lack of abuse. According to Class I, because the Committee focused on the issue of abuse, there is no evidence supporting the conclusion.

Class I insists that "a decision resting solely on a ground that does not justify the result reached is arbitrary and capricious." *MCI Telecommunications Corp. v. FCC*, 10 F.3d

842, 846 (D.C. Cir. 1993). Class I argues that the Committee's decision that there had been no partial termination was based solely on the lack of abuse. They contend that the findings of lack of abuse could not justify the result reached because, when a high percentage of Plan participants have been terminated, abuse need not be an issue and lack of abuse cannot be the sole reason for not finding a partial termination. Class I claims that the Committee's decision rested solely on a ground that did not justify the result.

It is unclear if the percentage considerations were sufficiently examined at the meetings, yet Mr. Barrington's testimony indicates that the percentage information was explained to the Committee [*See also* committee Minutes]. Ms. Jarnigan's statements reveal that constructive discharges were considered at the company level, and a decision made as to that issue was consistent with the determination of the undersigned that examining evidence of constructive discharges is not required.

This court finds that the Committee's determination was not arbitrary or capricious. It was a reasonable interpretation of the Plan and of the cases and regulations concerning partial termination. The percentage rates for the Plan year 1990-1991 and for the two-year period as a whole are above the 20 percent level, but there is no evidence that this workforce reduction was the result of anything more than an economic downswing. Unlike the cases involving permanent shutdowns of facilities, Sea Ray continued to employ a large amount of workers and has recalled many workers who were laid off during the relevant period. The sliding percentage scale should be applied. *See Halliburton*, 100 T.C. at 237, *citing Kreis*, 833 F.2d at 79-80. Since there is no evidence of abuse, I find that the percentage of participants terminated was insufficient for a finding of a partial termination. *See Tipton & Kalmbach, Inc. v. Commissioner*, 83 T.C. 154 (1984). Also, as noted in the

IRS Plan Termination Handbook, a "reduction in the number of employees covered by the plan may not, in and of itself, reflect that a partial termination has occurred; . . . ." § 252(10). It is RECOMMENDED that the Class I defendants' motion for summary judgment be DENIED, and that the cross-motions for summary judgment of plaintiffs and Class II defendants be GRANTED.[23]

Respectfully submitted,

/S/
Thomas W. Phillips
UNITED STATES MAGISTRATE JUDGE

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[23]Any objections to this report and recommendation must be filed with the clerk of the court within ten (10) days of receipt of this notice. Such objections must conform to the requirements of Rule 72(b), Fed. R. Civ. P. Failure to file objections within the specified time waives the right to appeal the district court's order. See *Thomas v. Arn*, 474 U.S. 140, 106 S. Ct. 466 (1985). The district court need not provide *de novo* review where objections to this report and recommendation are frivolous, conclusive or general. *Mira v. Marshall*, 806 F.2d 636 (6th Cir. 1986). Only specific objections are reserved for appellate review. *Smith v. Detroit Federation of Teachers*, 829 F.2d 1370 (6th Cir. 1987).

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TENNESSEE
AT KNOXVILLE

FILED

APR 13 9 12 A.M. '93

U.S. DISTRICT COURT
EASTERN DIST. TENN.
BY ___ DEP. CLERK

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,

Plaintiffs,

v.

DANIEL ROBINSON, ET AL. (CLASS 1)

Defendants,

No. 3:92-cv-587

MEMORANDUM AND ORDER

In a Report and Recommendation dated February 2, 1993 [Doc. No. 52], and amended February 18, 1993 [Doc. No. 56], Magistrate Judge Thomas W. Phillips recommended that plaintiffs' motion for class certification [Doc. No. 42] be granted with certain limitations. He also recommended that the administrative expenses, attorney's fees and fees of experts incurred in connection with this litigation be paid, and that all class members be given notice pursuant to Rule 23(c)(2), Fed.R.Civ.P. The court has reviewed the Report and Recommendation and defendants' timely-filed objection [Doc. No. 54] thereto. The court being in agreement with the Report and Recommendation, it is hereby ACCEPTED IN WHOLE. 28 U.S.C. §636(b)(1).

This is a declaratory judgment action wherein plaintiffs seek a determination that there has not been a partial termination of an employee benefit plan created pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"). Certain provisions of ERISA, as well as regulations promulgated pursuant to the Internal Revenue Code and the terms of the benefit plan at issue, define the meaning of a partial termination. The benefits plan is a combination stock bonus and profit sharing arrangement ("Plan") in which all contributions are made by the participants' employer, Ray Industries, Inc. ("Sea Ray"). Sea Ray's employees make no direct contributions to the Plan. Employees become participants in the Plan upon completion of one full year of service. The terms of the Plan also provide that participants forfeit any portion of their accounts not vested when their service terminates. Forfeitures of Plan assets occur where participants are terminated prior to the vesting of their accounts. These forfeitures are then allocated to the remaining Plan participants.

Plaintiffs' motion seeks certification of two classes of defendants. According to plaintiffs, the first class ("Class I") should consist of all former Sea Ray employees who were participants in the Plan *and* whose employment ended between July 1, 1989 and June 30, 1991, *and* who had an interest in the Plan that was not fully vested, along with the beneficiaries of such participants. The second class ("Class II") should consist of all present and former Sea Ray employees who were or are participants and who may be entitled under the Plan's terms to receive a portion of the forfeitures resulting from the termination of employment of the members of putative Class I.

The Internal Revenue Code requires that upon the partial termination of a qualified plan, the rights of all affected employees to benefits accrued as of the date of termination

must become non-forfeitable to the extent they are funded. 26 U.S.C. §411(d)(3). Thus, in the absence of a partial termination, the non-vested portion of the account balances of the Plan participants in putative Class I would be forfeited and reallocated to the accounts of the remaining Plan participants in putative Class II.

The putative Class I defendants have opposed the class certification proposed by plaintiffs. Plaintiffs and the putative Class II defendants propose a compromise, whereby Class I is enlarged.

I agree with the magistrate judge's recommendation, as amended, that the certification most recently suggested by plaintiffs appears to be in the best interest of the members of Classes I and II, and would not be prejudicial to the interests of either. Significantly, all parties agree that there should be two classes of defendant-participants, and that all Rule 23 requirements for class certification are met. The real dispute hinges upon the scope of Class I.

The magistrate judge recommended that the class certifications should be conditional and defined as set forth on Page 11 of the Report and Recommendation. Although the members of putative Class I object to this part of the Report and Recommendation, the magistrate judge's addendum should allay their concerns. Thus, my acceptance of the Report and Recommendation is made in the context of the magistrate judge's observations reflected in the addendum. The specific time period utilized in defining Classes I and II is a fact issue and cannot finally be determined until the proof is adduced at trial. Therefore, employees terminated on or after July 1, 1991 need not be included in Class I at this time, since their inclusion in Class I is more appropriately considered as an issue of fact to be resolved by proof offered at trial. The magistrate judge's recommendation as to this timing issue is

reasonable and practical under the circumstances. Therefore, the court's certification of Class I is conditional and, as recommended by the magistrate judge, plaintiffs and the members of Class II shall be estopped from contending that the argument for expansion of Class I to additional employees outside the initial time frame was not timely asserted by the members of that class.

As to the issues of expenses and attorneys' fees, and whether notice should be given to all class members pursuant to Rule 23(c)(2), none of the parties filed a timely objection. These matters were addressed by the parties and the magistrate judge as a result of issues that arose in the status conference held on December 15, 1992. The parties were then given an opportunity to brief these issues. I agree with the magistrate judge's recommendation that all administrative expenses, attorneys' fees, and fees of experts, if any, will be paid from Plan assets, subject to approval of both the administrative committee for the Plan and the court as to the amount of any such expenses. Further, I agree that all class members must be provided with notice of this action.

Therefore, in accordance with the above, it is hereby ORDERED that plaintiffs' motion for class certification is GRANTED. It is further ORDERED that notice be provided to all participants who fall within defendant Classes I and II, in the form proposed by counsel for the Class I defendants in the exhibit to their memorandum [Doc. No. 50], with the correction on Page 3 thereof under the heading "Class Determinations," to correctly set forth the composition of Classes I and II as conditionally certified by the court. It is further ORDERED that the administrative expenses, attorneys' fees, and fees of experts, if any, shall be paid from Plan assets, subject to approval of both the administrative committee and the court as to the amount of any such expenses.

ENTER:

/S/
James H. Jarvis
UNITED STATES DISTRICT JUDGE

97-5958

FILED

MAR 11, 1999

LEONARD GREEN, Clerk

UNITED STATES COURT OF APPEALS
FOR THE SIX CIRCUIT

ADMINISTRATIVE COMMITTEE OF THE SEA RAY EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN, ET AL.,	)	
Plaintiffs-Appellees,	)	
v.	)	ORDER
DANIEL ROBINSON, ET AL. (CLASS I)	)	
Defendants-Appellants,	)	
SHARON BALDOCK, ET AL. (CLASS II),	)	
Defendants-Appellees.	)	

BEFORE: KENNEDY and COLE, Circuit Judges; and RUSSELL, *District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Hon. Thomas B. Russell, United States District Judge for the Western District of Kentucky, sitting by designation.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/S/
Leonard Green, Clerk

SEA RAY

EMPLOYEES' STOCK OWNERSHIP AND PROFIT SHARING PLAN

Section 1. Nature of the Plan.

The purpose of this Plan is to enable participating Employees to share in the growth and profitability of Ray Industries, Inc. ("Sea Ray"), a wholly-owned subsidiary of Brunswick Corporation, and to provide Participants with an opportunity to accumulate capital for their future economic security. The Plan is intended to d this without any deductions from Participants' paychecks and without requiring them to invest their personal savings.

The Plan is hereby adopted effective as of December 30, 1986, as an amendment, restatement and continuation of the Ray Employees' Stock Ownership Plan (originally effective as of September 30, 1968). The Plan is a combination of a stock bonus plan (the "ESOP") and a profit sharing plan (the "Profit Sharing Plan"), each of which is qualified under Section 401(a) of the Internal Revenue Code (the "Code"). The ESOP is designed to invest exclusively in common stock of Brunswick Corporation and is an employee stock ownership plan under Section 4975(e)(7) of the Code.

All Trust Assets held under the Plan will be administered, distributed, forfeited and otherwise governed by the provisions of this Plan and the related Trust Agreement. The Plan is administered by an Administrative Committee for the exclusive benefit of Participants (and their Beneficiaries).

* * *

Section 16. Administration.

(a) Administrative Committee - Until June 30, 1990, the Plan will be administered by an Administrative Committee

composed of C. N. Ray, John C. Hedberg and Frederick J. Florjancic, Jr. or such successors as they may designate, serving without compensation. After June 30, 1990, the Plan will be administered by an Administrative Committee composed of at lease three individuals appointed by the Board of Directors of Sea Ray to serve at its pleasure and without compensation. The members of the Committee shall be named fiduciaries with authority to control and manage the operation and administration of the Plan. Members of the Committee need not be Employees or Participants. Any Committee member may resign by giving notice, in writing, to the Board of Directors of Sea Ray.

(b) Committee Action - Committee action will be by vote of a majority of the members at a meeting or in writing without a meeting. A Committee member who is a Participant shall not vote on any question relating specifically to himself unless he is the sole member of the Committee.

The Committee shall choose from its members a Chairman and a Secretary. The Chairman or the Secretary of the committee shall be authorized to execute any certificate or other written direction on behalf of the committee. The Secretary shall keep a record of the Committee's proceedings and of all dates, records and documents pertaining to the administration of the Plan.

(c) Powers and Duties of the Committee - The Committee shall have all powers necessary to enable it to administer the Plan and the Trust Agreement in accordance with their provisions, including without limitation the following:

(1) resolving all questions relating to the eligibility of Employees to become Participants;

(2) determining the appropriate allocations to Participants' Accounts pursuant to Section 6;

(3) determining the amount of benefits payable to a Participant (or Beneficiary), and the time and manner in which such benefits are to be paid;

(4) authorizing and directing all disbursements of Trust Assets by the Trustee;
(5) establishing procedures in accordance with Section 414(p) of the Code to determine the qualified status of domestic relations orders and to administer distributions under such qualified orders;
(6) engaging any administrative, legal, accounting, clerical or other services that it may deem appropriate;
(7) construing and interpreting the Plan and the Trust Agreement and adopting rules for administration of the Plan that are consistent with the terms of the Plan documents and of ERISA and the Code;
(8) compiling and maintaining at the offices of Sea Ray all records it determines t be necessary, appropriate or convenient in connection with the administration of the Plan; and
(9) reviewing the performance of the Trustee with respect to the Trustee's administrative duties, responsibilities and obligations under the Plan and Trust Agreement.

The Committee shall communicate to the Trustee a funding policy and investment guidelines for Trust Assets (other than Brunswick Stock) that is consistent with the objectives of the Plan and the requirements of ERISA.

The Committee shall perform its duties under the Plan and the Trust Agreement solely in the interest of the Participants (and their Beneficiaries). Any discretion granted to the Committee under any of the provisions of the Plan or the Trust Agreement shall be exercised only in accordance with rules and policies established by the Committee which shall be applicable on the nondiscriminatory basis.

(d) Expenses - All expenses of administering the Plan and Trust (including Trustee fees) shall be charged to and paid by Sea Ray directly, and payment of expenses by Sea Ray shall not be deemed to be Employer Contributions.

(e) Information to be Submitted to the Committee - To enable the Committee to perform its functions, Sea Ray shall supply full and timely information to the Committee on all matters as the Committee may require, and shall maintain such other records as the Committee may determine are necessary or appropriate in order to determine the benefits due or which may become due to Participants (or Beneficiaries) under the Plan.

(f) Delegation of Fiduciary Responsibility - The Committee from time to time may allocate to one or more of its members and/or may delegate to any other persons or organizations any of its rights, powers, duties and responsibilities with respect to the operation and administration of the Plan that are permitted to be so delegated under ERISA. Any such allocation or delegation shall be made in writing, shall be reviewed periodically by the Committee, and shall be terminable upon such notice as the Committee in its discretion deems reasonable and proper under the circumstances.

(g) Bonding, Insurance and Indemnity - To the extent required under Section 412 of ERISA, Sea Ray shall secure fidelity bonding for the fiduciaries of the Plan.

Sea Ray (in its discretion) or the Trustee (as directed by the Committee) may obtain a policy or policies of insurance for the Committee (and other fiduciaries of the Plan) to cover liability or loss occurring by reason of the act or omission of a fiduciary. If such insurance is purchased with Trust Assets, the policy must permit recourse by the insurer against the fiduciary in the case of a breach of a fiduciary obligation by such fiduciary. Sea Ray shall indemnify (and hold harmless) each member of the committee (to the extent permitted by law) against any personal liability or expense resulting from his service on the Committee, except such liability or expense as may result from his own willful misconduct.

(h) Notices, Statements and Reports - Sea Ray shall be the "Plan Administrator" (as defined in Section 3(16)(A) of ERISA and Section 414(g) of the Code) for purposes of the reporting and disclosure requirements of ERISA and the Code. The

Committee shall assist Sea Ray, as requested, in complying with such reporting and disclosure requirements. The Committee shall be the designated agent of the Plan for the service of legal process.

Section 19. Future of the Plan.

...

If the Plan is terminated (or partially terminated), participation of Participants affected by the termination will end. If Employer Contributions are not replaced by contributions to a comparable plan which meets the requirements of Section 401(a) of the Code, the Accounts of Employees affected by the termination will become nonforfeitable as of the date of termination....